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AVCP

Association of Village Council Presidents
Administration
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June 14, 2013

Via Electronic Mail Document Submission/Certified Return Receipt US Mail

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Tribal Consultations and Informational Meeting Comments
U.S. Department of the Interior
BIA Office of Indian Services, Mail Stop 4513 MIB
Washington, DC 20240
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Re: Comments on the Draft Revisions to the Indian Reservation Roads Program Regulations, 25 C.F.R. Part 170

Dear Mssrs. Gishi and Sparrow:

On behalf of the Association of Village Council Presidents ("AVCP"), we hereby submit the following comments in response to the Bureau of Indian Affairs (BIA) Federal Register Notice of April 12, 2013 (78 Fed. Reg. 21861), regarding Tribal Consultation on the Draft Regulations Governing the Tribal Transportation Program.

Our comments are divided into two categories. The first addresses rulemaking and consultation. The second provides specific comments to the proposed regulations.

I. Rulemaking and Consultation

The revision of any policy or regulations that contain tribal implications must be conducted in compliance with the Department of the Interior's (DOI) tribal consultation and coordination obligations as stated under Executive Order 13175 ("Consultation and

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Crooked Creek
Eek
Emmonak
Georgetown
Goodnews Bay
Hamilton
Hooper Bay
Lower Kalskag
Upper Kalskag
Kasigluk
Kipnuk
Kongiganak
Kotlik
Kwethluk
Kwigillingok
Lime Village
Marshall
Mekoryuk
Mtn. Village
Napaimiut
Napakiak
Napaskiak
Newtok
Nightmute
Nunakauyak
Nunam Iqua
Nunapitchuk
Ohogamiut
Oscarville
Paimiut
Pilot Station
Pitka's Point
Platinum
Quinhagak
Red Devil
Russian Mission
Scammon Bay
Sleetmute
St. Mary's
Stony River
Tuluksak
Tuntutuliak
Tununak
Umkumiut

Coordination with Indian Tribal Governments") (EO 13175), the IRR program regulations (25 C.F.R. Part 170), the Departments' tribal consultation plans, and the Memorandum for the Heads of Executive Department and Agencies of September 23, 2004 (Bush Memorandum).

Specifically, section 5 of EO 13175 obligates the Departments of the Interior and Transportation (the Departments) to explore consensual mechanisms for developing regulations, including negotiated rulemaking, if the revisions relate to tribal self-government and tribal trust resources. The Bush Memorandum confirms the unique legal and political relationship with Indian Tribes and Alaska Native entities under the U.S. Constitution and federal statutes. The regulations implementing MAP-21 undoubtedly implicate Tribal interests to self-government and the right to protect the health, safety and welfare of their members, thereby triggering the Department's obligations. While EO 13175 has no enforcement mechanism, to ignore its fundamental message is tantamount to disregarding entirely the fiduciary obligation of the federal government to the Indian Tribes and Alaska Natives.

Part 170 regulations provide that Department Secretaries should, to *the maximum extent permitted by law*, establish regular and meaningful consultation and collaboration with affected tribal governments, promote critical aspects of tribal self-government, uphold the trust responsibility of the United States, and facilitate the ability of tribal governments to implement transportation programs consistent with tribal sovereignty and the government-to-government relationship. *See* 25 C.F.R. § 170.103.

The existing regulations, which are the subject of revision, were developed through an extensive negotiated rulemaking process. The BIA's recent notice of tribal consultation on the draft revisions to the Part 170 regulations, published on April 12, 2013, indicates that Part 170 regulations will be revised through the publication of a Notice of Proposed Rulemaking and announces a "tribal consultation" process that offers Indian tribes, and more significantly, Alaska Tribes, a substantially reduced role in the regulatory process than would be afforded under negotiated rulemaking.

Under the process described in the BIA notice, tribes have the opportunity to review a significantly revised version of the Part 170 regulations, attend one of three regional meetings, and submit comments on the draft revisions.. The initial tribal consultation process not only eliminates any meaningful consultation through negotiated rulemaking, but is markedly distinct from the 13 regional meetings the BIA and FHWA held in 2012 seeking tribal consultation on the funding of proposed primary access roads.

The April 12 notice fails to explain why true consultation through negotiated rule making is being replaced by an abbreviated and noncompliant process, and the Alaska Tribes suffer the most. Of the 565 federally recognized Tribes, Alaska is home to 229, in a geographical region that encompasses 1/3 the size of the lower 48. To afford only one consultation opportunity in a region where the environment, culture, language, and geographic make-up is vastly distinct and travel to an urban city is cost prohibitive not only disregards the unique challenges of these Tribes, especially during critical subsistence seasons, but completely reduces true consultation to mere lip service.

The BIA and FHWA must revise the regulatory process set forth in the April 12, 2013 notice to either provide negotiated rulemaking process or some other collaborative consultation process that offers tribes a meaningful role in the development of these proposed regulations.

II. Comments to Proposed Part 170

Tribal Transportation Program Implementation and the Indian Self-Determination and Education Assistance Act:

In MAP-21, Congress has authorized that, upon the request of a tribal government, "*all* funds made available through the Secretary of the Interior under this chapter and section 125(e) for tribal transportation facilities . . . *shall* be made available . . . in accordance with the Indian Self-Determination and Education Assistance Act." 23 U.S.C. 202(b)(6)(A). The authorization extends to the Secretary of Transportation pursuant to 23 U.S.C. 202(b)(7)(A). In MAP-21, as in SAFETEA-LU (and, with respect to the Secretary of Interior, in the Transportation Equity Act for the 21st Century [TEA-21]), Congress left the Agencies no discretion to deny the request of a tribal government to enter into a contract or agreement for funding to carry out Tribal Transportation Program (TTP) (formerly IRR programs), programs, services, functions, or activities (PFSAs) under the ISDEAA. Congress specifically explained its intent to clarify the applicability of the ISDEAA to the IRR Program in SAFETEA-LU. In the Joint Explanatory Statement of the Committee on Conference (H.R. 3, Section 112), the Committee stated as to its authorization and requirement for ISDEAA contracts and agreements that:

"This section was added to the United States Code in TEA 21. The Committee felt at that time that the congressional intent with regard to tribal contracting authority was clear. Unfortunately, the Committee now believes the full intent of the TEA 21 amendments has not been fulfilled. This subsection aims to clarify the intent of the Committee on this important point for the Indian tribes."

The statutory terms in MAP-21 are consistent with those enacted in SAFETEA-LU (and, with respect to the Secretary of Interior, consistent with TEA-21). Yet, the BIA and FHWA draft Part 170 regulations contain numerous provisions that fail to conform to the express congressional mandate set forth in the statute.

The following are specific comments:

170.2(d): Add the following language at the end of this sentence: "and that the provision and support of transportation resources is one expression of the United States' trust responsibility toward Indian Tribes and individual Indians. This conforms to the 100% share in 23 U.S.C. 201(b)(7) and with the federal Indian trust responsibility.

Amend subsections 170.2(d) (1) and (2) to read as follows:

Each tribe is responsible for managing the day-to-day operation of its contracted federal programs, functions, services, and activities under the terms of its self-determination contracts, self-governance agreements, FHWA Program Agreements, or other appropriate agreements.

Each tribe accepts responsibility and accountability under the terms of its self-determination contracts, self-governance agreements, FHWA Program Agreements, or other appropriate agreements for

Use of the funds; and satisfactory performance for all activities funded under the contract or agreement.

Amend subsection 170.2(d)(3) as follows:

(3) The Secretaries will discharge the trust responsibilities of the United States to tribes and individual Indians;

Amend subsection 170.2(e) to read as follows:

The Secretaries will interpret federal laws and regulations to facilitate including programs covered by this part in the government-to-government agreements authorized under ISDEAA.

Amend subsection 170.2(f) by adding the Department of Transportation after “the Department of Interior.”

Amend subsection 170.2(g) by changing “Secretary” to “Secretaries.”

Amend Section 170.3 as follows:

TTP policies, guidance, and directives apply, to the extent permitted by law, only if they are consistent with this part and 25 CFR parts 900 and 1000. Except as specifically provided in the Act, or as specified in this part or 25 CFR Parts 900 or 1000, an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe, or tribal organization and the Secretary or otherwise required by law.

Amend Section 170.5 as follows:

Agreement. Agreement means a self-determination contract, self-governance agreement, FHWA Program Funding Agreement, or other appropriate agreement to fund and govern the Tribe’s administration over its programs, functions, services, and activities transferred to a Tribe. [*This agreement also confers administrative authority in addition to transferring funds.*]

BIA System Inventory. Eliminate the reference to “prior to October 1, 2004.” [*MAP-21 does not limit the BIA system inventory to facilities prior to October 1, 2004. This proposed language is not only unlawful but punitive.*]

Construction Contract. Amend subsections (2) and (3) as follows to ensure both tribally-administered and direct-service operations are covered:

For the housing improvement program or roads maintenance program of **a tribe funded by** the BIA; or for the health facility maintenance and improvement program **of a tribe funded by** the Secretary of Health and Human Services.

Consultation. Amend this definition to replace “secure” with “provide” to confirm the affirmative government’s trust obligation.

Indian. 25 U.S.C 450b(d) defines Indian as a person who is a member of “an Indian Tribe.”

Secretaries. Amend this definition to add “or designees authorized to act on their behalf.”

State Transportation Agency. Amend this section to replace “would” with “shall.”

STIP. Amend this definition as follows: STIP means **a** statewide Transportation Improvement Program **that** is a financially constrained, multi-year list of transportation projects, **which list** is developed under 23 U.S.C. 134 and 135, and 49 U.S.C. 5303-5305 **and reviewed and approved by the** Secretary of Transportation.

Add Tribal Land. Tribal Land means land that comprises an Indian reservation, or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal Government, or Indian or Alaska Native villages, groups, or communities in which Indians and Alaska Natives reside, whom the Secretary of Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.
[This definition is necessary to interpret the statutory definition of “tribal transportation facility” under 23 USC 202(b)(1)(A)(vii).

TTP program management and oversight funds. TTP program management and oversight funds means those funds authorized by 23 USC 202(a)(b) to **the extent necessary to meet** the costs of carrying out inherently Federal **functions required for Federal** TTP management and oversight and project-related administrative activities.

SUBPART B - TRIBAL TRANSPORTATION PROGRAM POLICY AND ELIGIBILITY>

Sec 170.100(a)(1). Replace “secure” with “provide.”

Sec. 170.100(b). Amend as follows:

Collaboration means that **the involvement of tribes in the federal decision-making process and** carrying out planning and project development work together in a timely manner to achieve a common goal or objective.

Section 170.101(j). Add a reference to FHWA to ensure the dual responsibility of both Secretaries.

Section 170.104. Replace "Secretary" to "Secretaries."

Add the following section.

Sec. 170.138 Can roads be built in roadless and wild areas?

Yes, unless the secretary has designated a specific area as roadless and wild on an Indian reservation under 25 CFR Part 265.

TTP coordinating Committee.

(b). The committee consists of 26 tribal regional representatives (2 from each BIA region except Alaska includes four) and two non-voting federal representatives (FHWA and BIA.)

Section 170.226 What facilities are included in the National tribal transportation facility inventory (NTTFI)?

As used in (b) and (c) above, "owned" means having the authority to finance, build, operate, or maintain the facility. See 23 USC 101(a)(20). As used in (f) above, "providing access to ... Indian or Alaska Native villages, groups, or communities in which Indians and Alaska Natives reside" means a public road or other tribal transportation facility, designated by the tribal government as providing its tribal members with access to jobs, markets, health, education and social services, supplies and other critically needed resources, including water sources, natural and other resources necessary for economic development, and access to airports, harbors, and boat landings.

Section 170.227 How does the BIA develop the NTTFI?

Add the following language: "The BIA shall accept primary access routes designated by a tribe pursuant to Section 202(b)(1)(B)(vii) and shall accept roads providing access to an Indian or Alaska Native Community as designated by a tribe pursuant to Section 202(b)(1)(B)(vi).

Section 170.228 Are all facilities included in the NTTFI used to calculate tribal shares?

No. Only those facilities identified in sec. 170.226(a), (b), and (c) may be used in the calculation of the portion of tribal shares identified in sec. 170.201(a).

FORMULA DATA APPEALS

Section 170.231. What data used in the determination of tribal shares may be appealed?

Eliminate the last sentence in this section foreclosing appeals.

Section 170.443. What is required to successfully include a proposed transportation facility in the NTTFI?

This list of requirements is not realistic and includes information that will not be available until later on in the project such as commitments for funding.

Section 170.600, notice of funds availability, has been substantially revised to address changes made in MAP-21, but it does not address the perennial failure of the BIA to timely distribute tribal transportation funds in accordance with the statute. MAP-21 retains the statutory mandate that the Secretary of the Interior distribute funds to the tribes no later than 30 days after the date on which such funds become available (*see* 23 U.S.C. 202(b)(4)(A)). The current system is clearly not working, and the BIA should use this regulatory revision process to address the problem and ensure compliance with the statute. BIA input is needed to identify the existing problems, but we request that a new section be added to the Part 170 regulations that directs the BIA to allocate appropriate tribal funds to the Regional offices and Office of Self-Governance within 15 days of the date that they become available to the BIA, and that these offices be required to distribute such funds in accordance with applicable agreements within the 30-day period. If the funds are not transferred within the statutory deadline, the BIA should be required to provide the Tribe written notice, prior to the deadline, describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

III. Conclusion

If you have any questions or need clarification on any of the foregoing comments, please feel free to contact me. If the Departments proceed with a Notice of Proposed Rulemaking, we request that you provide your written response prior to publishing the Notice of Proposed Rulemaking and that we be afforded the opportunity to respond to any comments with which the Department disagrees. Thank you.

Sincerely,

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS

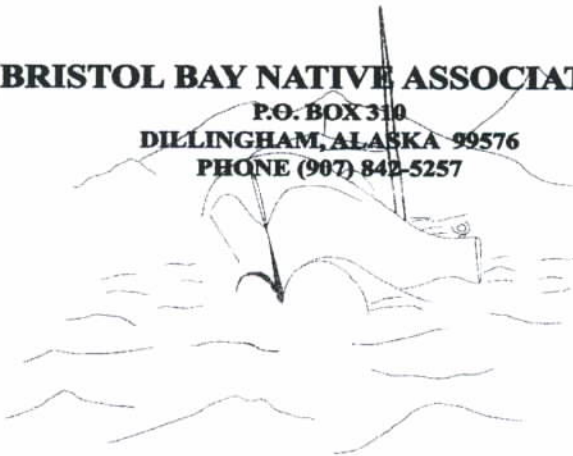
Myron P. Naneng, Sr., VICE PRESIDENT
FOR:

Myron P. Naneng, Sr.
President

cc: Clarence Daniel, AVCP Transportation Director
Carol J. Brown, AVCP Tribal Advocate/General Counsel
Michael J. Hoffman, AVCP Executive Vice-President
Senator Mark Begich
Senator Lisa Murkowski
Congressman Don Young

BRISTOL BAY NATIVE ASSOCIATION

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- Aleknagik*
- Chignik Bay*
- Chignik Lagoon*
- Chignik Lake*
- Clarks Point*
- Curyung*
- Egegik*
- Ekuk*
- Ekwok*
- Igiugig*
- Iliamna*
- Ivanof Bay*
- Kanatak*
- King Salmon*
- Kokhanok*
- Koliganek*
- Levelock*
- Manokotak*
- Naknek*
- New Stuyahok*
- Newhalen*
- Nondalton*
- Pedro Bay*
- Perryville*
- Pilot Point*
- Port Heiden*
- Portage Creek*
- South Naknek*
- Togiak*
- Twin Hills*
- Ugashik*

June 13, 2013

VIA E-MAIL

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Division of Transportation
Bureau Of Indian Affairs
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Mail Stop 4513 MIB
Washington, DC. 20240

RE: Comments to Draft Proposed 25 CFR 170

Dear Mr. Sparrow and Mr. Gishi:

The Bristol Bay Native Association (BBNA) operates a small tribal consortium that has fully assumed operation of the TTP pursuant to Title IV of P.L. 93-638. On staff we have two individuals who have been involved in the implementation of the TTP with a combined experience of over 35 years. They have been active participants in the efforts of the Tribal Transportation Program Coordinating Committee, and before that in the negotiated rulemaking for 25 CFR Part 170. They participated in the consultation meeting of May 14, 2013 in Anchorage, Alaska.

First, we believe the best method to use for revising the Part 170 regulations is to initiate a tribal-federal negotiated rulemaking. This could be expedited by limiting the negotiation to specific key issues (e.g., proposed roads and access roads). We believe that a packet could be provided to focus discussion that would include the pertinent sections of MAP-21 and the particular parts of the regulation the BIA and FHWA believe should be changed, and their recommendations. We suggest inviting knowledgeable tribal participants from the original negotiated rulemaking to provide historic context, whether or not they are actual delegates.

The revisions to 25 CFR 170 should only make changes required by MAP-21 and not otherwise rewrite sections of the negotiated regulation, *unless* the change corrects ambiguities or conflicts, clarifies the application of existing statutory law, or corrects technical errors. We believe, for example, that one problem with implementing the IRR inventory system was that the regulations did not directly incorporate and explain the consistency and coordination requirements for transportation planning under 23 USC 204(a). Since tribal and BIA staff tend to just look at the regulations rather than the law, this was a significant shortcoming.

As a preliminary comment, it is very frustrating to once again be providing comments without knowing the results of the previous call for comments. We are referring to the proposed and access roads consultation and call for comments from 2012.

We believe that Part 170 was never properly implemented. There was a serious failure by both the BIA and the FHWA to serve as gatekeepers to what was allowed into the IRR Inventory for funding purposes. This is a federal database, and the program has been statutorily within Federal Lands Highways. Since the inventory is used to allocate funding, we believe the federal agencies have a clear fiduciary obligation to ensure the inventory is administered uniformly and accurately under consistent rules, all of which have to comply with Title 23 as well as the regulations.

More specifically, there were four major categories of mistakes:

- 1) Allowing tribes to add urban roads owned by others as 100% funded routes.
- 2) Not excluding proposed roads from the calculation of Vehicle Miles Traveled. We understand that those in charge at BIA Albuquerque used 20 year default ADT, in clear violation of the requirement to use actual ADT (Appendix C to Subpart C, 7).
- 3) Allowing federally owned roads other than those owned by the BIA to be included in the inventory and funded at 100%. The intent of the negotiated rule was that IRR funding (as generated by the formula) not double up on other available federal funding; these roads are already federally funded at 100% if the respective federal agency chooses to construct them. (Some of these roads should probably be funded at 100% as "primary access" routes, but not most.)
- 4) Allowing proposed roads to be added without applying a uniform planning horizon, and also adding proposed roads as tribally owned when the tribe does not have control of the land. The latter is a jurisdictional issue and a core definitional requirement for a road to be included in the program. A tribe cannot be the "public authority" in areas where it has no legal authority to act; for a proposed road it has to either own the land, or enter an agreement with the landowner for a future right-of-way, or at least have some reason to be certain it can obtain the right-of-way. Otherwise the tribe cannot truthfully certify the proposed road meets the statutory requirement that there will be a public authority with jurisdiction and maintenance responsibility. The BIA has apparently allowed some "tribal" proposed roads into the inventory in places, e.g. federal preserves, where the tribe has no jurisdiction and new road construction is prohibited by law. At a minimum, landowners along the proposed route should provide written intent to provide a public easement to the tribe. We don't object to adding these routes to the Inventory, but they should

not drive funding in the formula unless the tribe demonstrates it has, or can obtain, the right-of-way.

We are also resubmitting the comments we provided to the proposed and access road consultation from 2012. We believe the comments provided then have not been adequately addressed and we would like to know what other comments were provided and how the government addressed them.

We have very strong reservations on how the recent consultation meeting was conducted. Tribal representatives were not provided with any document that shows how the draft regulation differs from the current ones, or what the federal rationale was for changes not required by changes to MAP-21. We had hoped for some level of pre-consultation discussion to help tribes with the process. We were also hoping for a dialogue with the federal representatives present. This did not take place.

Although we have attached section-by section comments, we have a few more specific issues to highlight. We are very disappointed that the proposed draft does not appear to address the access road/boundary issue that was the topic of the last consultation. How far out can access roads go, and from where? We generally agree with the Program Coordinating Committee's recommendation on this, but our main concern is that definitional questions be clearly answered one way or another.

We urge that the regulations specify that tribal transportation must use a 20-year planning horizon for proposed road submittals. We believe the 20-year horizon is indirectly required by Title 23 anyway, and it is completely irrational for the BIA to allow some tribes to use what are essentially 200 year plans when most tribes use the 20 year horizon specified in the regulations and planning guides.

We strongly disagree with the removal of the data appeal process.

In general, changes that are due to the change from IRR to TTP are fine. Also any change that is made to ensure better understanding and compliance with the existing statutory language, whether pre-existing or from MAP-21 should also be non-controversial if accurately done. Other changes require some federal explanation of why the change is being made. Also, we are concerned that other changes within MAP-21 may not be fully covered in the draft

Thank you for this opportunity to provide our comments.

Sincerely,



Ralph Andersen
President and CEO

Bristol Bay Native Association
Comments to Draft 25 CFR 170

The comments provided below are in sequence from the beginning to the end of the draft regulation.

Sec. 170.5 Definitions

BIA System Inventory – need an explanation for BIA and Tribal Roads added after 2004. Also recommend explanation of OK and AK routes included by language in 1993 appropriation.

Construction

- (1) Preliminary engineering – use of term “highway” seems too limiting, expand to “transportation facility”.

Program Agreement – add the Office of Self-Governance. Also, a program assumption agreement can provide that a specific contractible function stays with the government, if the parties agree, without changing the underlying nature of the agreement. This might be clarified.

Public road – we recognized that this is a statutory definition, but recommend interpreting “road” so as to include “trail”

Tribal Road System – We believe the government can remove routes from the NTTFI that were included as of FY 2012 but should not have been. What if a road was included by fraud or the ownership is wrong due to a data entry error? We recommend language that allows for corrections to the NTTFI. Even if the NTTFI as used for funding is frozen at the FY 2012 data, the freeze is unlikely to last in its present form in the next authorization bill and it is incumbent upon the federal agencies (and tribes) to continue updating and correcting the NTTFI.

Tribal Transportation Facilities – We believe this is not a complete list. It should also include parking areas, rest areas, shelters, and other facilities.

Sec 170.116

(e) Purchase of Equipment - We strongly prefer the original language. We don't believe government approval is or should be necessary for tribes with program assumption agreements. If there is a change in the statute supporting this, please advise where it is.

Sec. 170.120 – subpart (e) dealing with permanent closures and removal from the inventory doesn't really belong in this section; it's a different topic. We suggest a new section dealing with this issue, and also addressing the similar situation when a tribe doesn't completely close a road but closes it permanently to the general public.

Sec 170.132 – We recommend including language such as a shelter at airports.

Sec 170.142 –

(2) Education: We recommend adding programs for youth education in or outside of school.

Sec 170.-155 – We support the change to 24 voting members of the TTP Coordinating Committee.

Appendix A to Subpart B

49. - We recommend taking out language regarding purchase, but add a section about developing a cost benefit analysis for purchase of equipment for construction or maintenance activities. Approval by FHWA should not be required.

General Data Appeals

170.231 and 232 – We recommend that language continue to be included for data in the NTTFI and that language be provided for how to appeal population numbers.

TTP Inventory and Long-Range Transportation Plan (LRTP)

-We recommend going back to the original language where LRTP stands for “planning” rather than plan. The revision as written does not work in many of the following sections. This is not a required change of MAP-21 and we are unaware that this was recommended by the TTPCC.

Formal Data Appeals –

170.231 - We recommend providing additional information on how a tribe may appeal population numbers; include this after Sec 170.232 (see comment above for 170.231 and 232.)

Sec 170.405 – This section references 170.407 – a section that no longer exists.

Sec 170.407 – Why was this section removed?

Sec 170.410 – Why was development of a plan by the BIA taken out? We recommend that it be placed back in, and that this also be an activity that the FHWA may provide on the tribe’s behalf.

Sec 170.411 – Changing “may” to “should” is not justified, go back to original language.

Sec 170.420 – We recommend including the original “(a)” May or may not identify projects in order of priority. No justification for change in MAP-21.

Sec 170.421 – How can the TTIP not be financially constrained? We don’t understand the change, unless this is just a typo.

Public Hearings – Heading was removed; we don’t understand why.

Sec 170.443 - We have several comments on proposed facility submittals:

- The composition and function of the Quality Assurance Team should be described somewhere, probably in another section. We also think some process steps should be defined, such as the Tribe's right to meet with the team. We are supportive of the QAT in concept.
- The regulation should clarify that the 20-year planning horizon normally used in long-range transportation planning applies to proposed facilities. This could be addressed either by a certification requirement, i.e. the tribe (if it's the public authority) must certify that it intends to build the facility within 20 years, or it could be addressed through the LRTP if that clearly identifies projects to be built in 20 years, or both.
- We recommend that the submittal clearly identify the public authority who will own the public easement. (This may be implied but it is not stated).
- Subpart (c) largely misses the point. We agree with it in the situation where the tribe is putting a proposed facility in the inventory but some other governmental landowner is going to be the public authority. In that situation, the project should be in the landowner's plans. But when the tribe itself is going to build the facility and be the public authority, it has to be able to demonstrate it has the actual authority to do so. Otherwise the facility doesn't meet the statutory definition of public facility. This is a site control/ownership issue, and also jurisdictional. We strongly recommend requiring, for tribally owned proposed facilities (typically a road), that the tribe submit either an agreement regarding right-of-way or a clear written statement of willingness to provide a right-of-way from each necessary landowner along the route. If the landowner is a government agency, the inclusion of the project as a *tribal project* in the agency's own transportation plans would suffice. (If the tribe itself is the landowner already, the willingness to provide a public easement can just be expressed in the resolution.)
- We agree with the concept of (e) regarding feasibility but would be more comfortable with it if the required documentation is described. This should not require an excessive, burdensome analysis. It should not require a cost-benefit analysis as such.

Sec 170.446

(d) ADT Backup – We recommend this be removed. No-longer a factor needed by MAP-21.

(f) Incidental- We recommend this be removed. No-longer a factor needed by MAP-21.

(g) Acknowledgement – We recommend that what is needed is a document indicating ownership. It can include an inventory list of public facilities owned by the public authority, maps including easement maps, or other official documents.

New (h) Proposed tribally owned roads:

- (1) When the Tribe owns the land in fee simple, or the land is held in trust by the Federal government on behalf of the Tribe, the Tribe must provide a resolution that includes designation of the public easement for the proposed road.
- (2) When the Tribe does not own the land, documentation must be provided by landowner(s) indicating intent to provide the public roadway easement to the Tribe.

Appendix C to Subpart D – Cost to Construct – no longer valid under MAP-21– we recommend removal.

Average daily traffic - no longer valid under MAP-21– we recommend removal.

Functional Classification – We recommend adding an additional functional classification for primary access trails.

Construction Need - no-longer valid under MAP-21– we recommend removal.

Table 1 - no longer valid under MAP-21– we recommend removal.

Table 2 - no longer valid under MAP-21– we recommend removal.

Table 3 - no longer valid under MAP-21– we recommend removal.

Table 4 - no longer valid under MAP-21– we recommend removal.

Table 5 - no longer valid under MAP-21– we recommend removal.

Table 6 - no longer valid under MAP-21– we recommend removal.

Table 7 - no longer valid under MAP-21– we recommend removal.

Table 8 - no longer valid under MAP-21– we recommend removal.

170.618 - we recommend that this state that the excess funds must be used for TTP TIP projects.



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Roads department

June 14, 2013

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Dear Mr. Gishi and Mr. Sparrow

The Hydaburg Cooperative Association (HCA) is pleased provide comments on the Bureau of Indian Affairs (BIA) consultations regarding updating the 25 CFR Part 170 regulations. We reviewed the materials handed out at the Anchorage Consultation Session on May 14, 2013, and the BIA consultation policy. The 25 CFR Part 170- regulations govern a key program that we operate for our tribal members.

It is difficult to identify what was changed from the exiting regulation to the proposed regulation. The proposed revision raises the concern that the agencies are, in some instances, revising negotiated rules where no statutory change required. This is extremely troublesome to HCA. Changes like this can have enormous impacts on the Tribe's Self Determination regarding the program's

essential governmental function that has vital impact upon the health, safety and economic well-being of HCA. We request that a side by side comparison be provided so HCA can clearly identify the proposed changes to the regulations prior to issuing a Notice of Proposed Rulemaking. We do not feel that this is an unreasonable request in order to obtain meaningful input from Tribes.

We reviewed Section 170.443 and are extremely concerned with its content. With this Section the BIA is singling out small remote Alaska Tribal governments in favor of large land based Tribes. The small remote tribes do not have the resources necessary to complete the planning/engineering work required to put a proposed route in the inventory. BIA conducted a consultation on proposed roads and access in June 2012 and a year later we still do not have the results. HCA feels that all tribes in the program should be treated the same and this proposed regulation change is prohibiting the smallest most remote tribes from participating in the program.

Tribal consultation is meant to be meaningful government to government consultation. HCA strongly feels that adequate time should be provided to updating the regulation so meaningful dialog can be had on each section of this important regulation. BIA current process does not appear that they are interested in meaningful dialog but rather going through the motions to say that they completed Tribal consultation. Self Determination is very important to the tribal government and the existing regulations were developed through an extensive negotiated rulemaking process, thus they directly implicate tribal self-government and tribal trust resources. **We strongly insist the BIA use negotiated rulemaking to update the regulations.**

In closing, we appreciate your consideration of HCA's comments and we look forward to a prompt written response from you.

Sincerely,



Sidney Edenshaw
Tribal President



ORGANIZED VILLAGE OF KASAAN

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Ketchikan, Alaska 99901-0340
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May 9, 2013

U.S. Department of the Interior
Bureau of Indian Affairs-Office of Indian Services
Tribal Consultations and Informational Meetings
1849 L Street, MS-4513-MTB
Washington, DC 20240

**RE: Draft 25 CFR, PART 170 Tribal
Consultations and Informational Meetings**

Dear Mr. Busck,

The Organized Village of Kasaan (OVK) has received the "Dear Tribal Leader" letter date April 12, 2013 announcing that the Bureau of Indian Affairs (BIA) will be conducting Tribal Consultation on the draft proposed revisions to 25 CFR, Part 170 the Tribal Transportation Program. As well as cover the requirements for proposed roads and access roads to be included in the National Tribal Transportation Inventory.

First, I wouldn't call these Tribal Consultation Meetings because it goes against the Department of Interior's Tribal Consultation Policy and does not meet the definition spelled out within the proposed 25 CFR, Part 170 revisions. "Consultation means government to government communication in a timely manner by all parties about a proposed or contemplated decision in order to:"

- 1) Secure meaningful Tribal input and involvement in the decision making process, and
- 2) Advise the Tribe of the final decision and provide an explanation.

Second, the BIA has not provided a "redlined version" of the proposed changes of 25 CFR, Part 170 so the Tribes can do an in depth analysis of the proposed changes to see what kind of impacts the changes may have on the Tribes? BIA has not provided any of the requirements to the Tribes on the requirements for the proposed roads and access roads to be included in the National Tribal Transportation Facility Inventory.

Based on what has been sent to the Tribes throughout the United States of America on the proposed revisions to 25 CFR, PART 170, as well as the new requirements that are going to be imposed on Tribal governments should not be considered an official identification of Tribal Consultation until all the Tribes throughout the United States of America have an opportunity to receive and analyze the proposed revisions and requirements to see what are those impacts or potential impacts on Tribal governments? This is Not Tribal Consultation until Tribes have all the same documents as the BIA and have an opportunity to review them for their content. Then we may call it government to government

Consultation. But, until then it is an action that already has been decided and we are just going these meetings for formality.

The BIA had conducted Tribal Consultation on the proposed requirements for proposed road and access roads Tribes might want to put onto the National Tribal Transportation Facility Inventory in June of FY2012. The Tribes have never been given the results or comments from those sessions and how all those questions were going to be weighted out. Now, the BIA has come forth with requirements for the proposed roads and access roads. It totally not government-to-government.

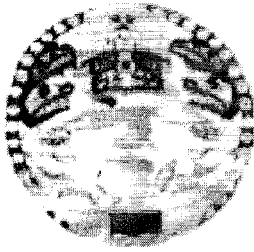
There are areas here in Alaska that have no connectivity from one Village to the next or from one Village to the hub Village within those areas so they are traveling these routes by Off Highway Vehicles (OHV), which makes it very unsafe and challenging in just getting the bare necessities to survive in a rural area.

Tribes can't afford to spend the kind of funds or get the resources necessary to do the requirements needed just to put a proposed road or an access road onto the National Tribal Transportation Facility Inventory. These requirements seem to happen later on within project development of a specific road or route. OVK feels that there should be a sunset clause of 5 years used instead of just outright making Tribes spend huge amounts of money to get these routes within the National Tribal Transportation Inventory. If a Tribe does demonstrate that it has been doing their Design and Environmental Documentation on a route within 5 years than remove it from the inventory.

The OVK will comment on the proposed revisions to 25 CFR, PART 170 in an additional submittal to the BIA. Thanks for your time and consideration to the OVK's comments and should you have any questions or comments in regards to the content of this letter, you may contact Mr. Edward K. Thomas, Jr (Sam) at (907) 461-0967.

Sincerely,


Paul K. Peterson
Tribal Administrator
Organized Village of Kasauk



ORGANIZED VILLAGE OF KASAAN

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907) 547-2220

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May 4, 2011

United States Department of the Interior
Bureau of Indian Affairs/Office of Indian Services
Tribal Consultations and Informational Meeting Comments
1019 C Street, MS-4613-ME2
Washington, DC 20240

**RE: Draft 25 CFR, PART 170 Tribal Consultations
And Informational Meeting Comments**

Dear Ms. Black,

The Organized Village of Kasaan (OVK) has received the Dear Tribal Leader letter dated April 12, 2011 announcing the Bureau of Indian Affairs Tribal Consultation sessions to discuss the proposed revisions to 25 CFR, PART 170 the Tribal Transportation Program (TTP). OVK has reviewed the proposed revisions and offers the following input to the proposed revisions.

Sec. 170.5

Alaska Native- Per definition in SAFETEA-LI

National Tribal Transportation Facility Inventory- (1) was included in the Bureau of Indian Affairs system of entities prior to October 1, 2011. (2) Are primary access routes identified by Tribal governments (including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development, and roads that provide access to intermodal terminals such as airports, harbors, barge facilities, and boat landings)

Tribal Force Account- means work performed by Tribal Employee work force or employees

Sec. 170.15

(1)(B) The committee consists of 24 Tribal regional representatives (two from each BIA Region), a primary representative and an alternate representative. Two non-voting Federal representatives (BFWA and BIA)

Appendix A to Subpart B- Allowable Use of TTP Funds

30) Tribal Force Account- the planning, development, and implementation of a Tribal Force Account or workforce within a Tribal government

Appendix B to Subpart C B- Sources of Tribal Transportation Training and Education Opportunities
B. BIA's Tribal Transportation Operations

Sec. 170.226

4. Were included in the Bureau of Indian Affairs system prior to October 1, 2012
g. Are primary access routes identified by tribal governments, including roads between villages, roads to
hospitals, roads to drinking water sources, roads to natural resources identified for economic development,
and roads that provide access to intermodal terminals such as airports, harbors, barge facilities, and boat
landings.

Sec. 170.441

Regulatory Section, it is not effective to impose this type of preliminary planning activities with such
high programmatic costs or pre-conditions on the Tribes.

Thanks for the opportunity to provide input or comment to the proposed revisions to 25 CFR, PART 170
the Tribal Transportation Program. Should you have any questions or comments to our request, please
contact Mr. Edward K. Thomas, Jr. (Sam) at (907) 461-0964.

Sincerely,



Paula K. Takerson
Tribal Administrator
Organized Village of Kasaan



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June 11, 2013

LeRoy M. Gishi, Chief
Division of Transportation
Bureau of Indian Affairs
1849 C Street, NW
MS-4513
Washington, DC 20240

Robert W. Sparrow, Jr., Director
Tribal Transportation Program
Federal Highway Administration
1200 New Jersey Avenue, SE
Room E61-311
Washington, DC 20159

**Re: Kawerak, Inc., Nome Eskimo Community, and the Native Village of Council's
Comments on the Draft Tribal Transportation Program Regulations 25 C.F.R. Part
170**

Dear Mr. Gishi and Mr. Sparrow:

Kawerak, Inc. (Kawerak), Nome Eskimo Community (NEC), and The Native Village of Council (NVC) hereby offer the following comments in response to the Bureau of Indian Affairs (BIA) Federal Register Notice of April 12, 2013 (78 Fed. Reg. 21861) regarding tribal consultation on the 25 CFR Part 170 Draft Regulations governing the Tribal Transportation Program. We begin with a brief overview of Kawerak, Nome and Council and the conditions in which they operate their Tribal Transportation Programs within the Bering Strait region of Alaska. We then provide an overall summary of our concerns regarding the draft regulations and the effect we believe the draft regulations will have in our region and for Alaska tribes throughout the state, followed by comments regarding the consultation process used by BIA/FHWA to date. We conclude with comments regarding specific provisions of the draft regulations.

[Overview of Kawerak, NEC and NVC's Tribal Transportation Program and Conditions in the Bering Strait Region of Alaska:](#)

Kawerak is a nonprofit corporation and tribal consortium authorized by Bering Strait Region tribes to administer certain programs of the BIA pursuant PL 93-638 and has compacted the FHWA Tribal Transportation Program (TTP) on behalf of 16 federally recognized tribes in this region. Kawerak has established its Transportation Program to fulfill the requirements under its compact with BIA and FHWA and to coordinate with all governmental entities within its consortium which have transportation roles and responsibilities.

Kawerak serves the Bering Strait region in western Alaska. Currently 17 communities occupy the Nome Census Area, of which Nome has the largest population at 3,598 and is the regional hub for medical and transportation facilities including a port and harbor, and other essential services for the region. The Bering Strait region is about the size of West Virginia with a population of over 9,900. Most of our villages lack basic infrastructure such as water and sewer, roads, ports and harbors. The situation can be compared to third world living conditions.

Unlike most areas in America, a road system does not exist throughout the Bering Strait Region. Within the region, two State roads connect Nome to the villages of Teller and Council, which are open in the summer months and closed during winter. Air transportation is the most common and reliable mode of transportation throughout the year. During Nome's summer it is a hub for ocean shipping—which handles community re-supply and destination traffic. The conditions in this remote region of Alaska are unique—as are the needs with respect to development of transportation infrastructure.

The NEC is a Tribal entity serving over 2,700 members through the administration of programs including BIA's Tribal Transportation Program. NEC has over 275 miles of official routes in the BIA Roads inventory. As a regional hub, these roads serve many who live outside of Nome as well as the residents of Nome whose total population, according to the Nome's 2010 U.S. Census population was 3,598.

The condition of the roads in the Nome roads inventory vary, but generally the roads are existing gravel roads in fair to poor condition. In addition to poor road surfaces, the area has other design and construction challenges. Nome roads are underlain by near continuous permafrost which can be problematic for road-building and maintenance crews. Climate change is beginning to melt the permafrost which has contributed to ground failure and destabilization of the ground in some areas. The transportation network is also impacted by erosion and severe storm damage which happens on a regular basis and causes road damage and exacerbates existing drainage issues.

NEC maintains a close partnership with the City of Nome and provides the city with funding to maintain local roads on an annual basis. In 2011, NEC joined with city forces to complete a road rehabilitation project using BIA funds. Other priorities currently under design include resurfacing and drainage improvements to roads on Nome's east side. Rehabilitation of these roads is scheduled in the summer 2014 pending adequate

funding. Safety and dust control (which poses a serious health hazard) also remain a high priority with NEC.

NEC also serves on the City of Nome's Transportation Workgroup whose members include City of Nome administration and maintenance staff, Nome Joint Utilities, the Alaska State Department of Transportation and Public Facilities Design, Construction staff in Nome, and planning staff in Fairbanks. The Workgroup coordinates planning efforts for community projects that impact the Nome transportation network. The Native Village of Council (NVC) is a federally recognized tribe located in the Bering Straits region of Alaska. NVC contracts with FHWA to administer the Tribal Transportation Program for the community of Council and surrounding lands. NVC has been participating in BIA roads programs since 2010.

The Native Village of Council (NVC) is a federally recognized tribe located in the Bering Straits region of Alaska. NVC contracts with FHWA to administer the Tribal Transportation Program for the community of Council and surrounding lands. We have been participating in BIA roads programs since 2010.

Summary of Concerns:

Our opposition to provisions of the draft regulations, and our suggested alternative approaches, as provided below, are based on the unique conditions we are faced with in developing our transportation infrastructure. It is critical that BIA/FHWA understand the disparate and devastating effect some of the proposed provisions may have on Kawerak, NEC and NVC's continued ability to develop transportation infrastructure for our tribes in this region. We are concerned that sections of the draft regulations identified below will:

1) Create undue hardships for Alaska tribes in implementing Tribal Transportation Programs. As noted above, tribes in our region and throughout rural Alaska are operating in extremely poor conditions with limited resources. The transportation needs are immense. The proposed system within the draft regulations will have the net effect of putting in place even greater obstacles to our ability to build roads. BIA/FHWA should be working in partnership with tribes in Alaska to find solutions to overcome existing obstacles to development of roads here, not creating additional obstacles through these draft regulations.

2) Disparately reduce funding to tribes in Alaska with the least existing roads (i.e. the least infrastructure). We believe a consequence of the additional burdens and restrictions contained within the draft regulations will most negatively affect tribes in our region and rural Alaska by reducing Tribal Transportation Program funding in our region—a region of the country that has some of the greatest needs with respect to building its infrastructure. Funding for tribes in Alaska is expected to be reduced already through the provisions of MAP-21, and we expect funding will be further reduced by provisions of these regulations. This will be devastating for our region, and

is exactly the opposite of what the agencies should be doing for this area of the country with the least existing infrastructure.

3) Take decisions regarding needs for development of roads away from tribes in Alaska and put them into the hands of agency staff who lack the experience or local knowledge to make such decisions. Provisions in the draft regulations create additional layers of oversight and additional hurdles for tribes in several areas as noted below, and at the same time do away with the ability of tribes to appeal agency staff decisions. The overall effect of the draft regulations is to substantially limit a tribe's ability to make its own decisions, locally, regarding what is important to the tribe with development of tribal infrastructure. Tribes are best suited to make such decisions, and this completely undermines the principles of self-governance through which the Tribal Transportation Program exists.

General Comments regarding Process:

BIA/FHWA is proposing changes to 25 CFR 170 that are not statutorily justified, and through a rushed process that affords tribal entities very limited ability to respond and be engaged in the regulatory process. The appropriate mechanism to consider changes to the Tribal Transportation Program funding formula is through negotiated rulemaking. The Transportation Equity Act for the 21st Century (TEA-21) called for the tribal/federal negotiated rulemaking committee to develop a new IRR funding formula for fiscal year 2000 **and each subsequent fiscal year thereafter**. We request that this process be honored and followed. We also request that all comments be available to tribes before publishing a Notice of Proposed Rulemaking.

The Tribal Transportation Program Coordinating Committee (TTPCC) met within the last year and made comments about the draft regulations regarding proposed roads and documentation required for submission for proposed roads. Kawerak, NEC and NVC disagree with the TTPCC's position. Tribal consultation was held on proposed roads and access on July 18, 2012 here in Nome, Alaska. Kawerak provided comments regarding the draft regulations, including comments and explanation disagreeing with the TTPCC's recommendation to include a feasibility study and environmental study to be completed for all proposed routes. We believe these additional requirements would entail extensive, excessive, and costly documentation that would be overly burdensome for tribes. BIA/FHWA represents that it is still in the process of receiving input and comments through the consultation process and has not yet made any final decisions regarding the regulations. However, BIA/FHWA has incorporated the TTPCC's recommendations into its latest draft of the 25 C.F.R. 170 regulations provided to tribal entities at the recent consultation in Anchorage held on May 14, 2013, without responding to the concerns and opposition provided by Kawerak and other tribal entities, as though these provisions of the regulations (and the TTPCC's position) have been unilaterally accepted and are the basis from which to move forward any further discussions/consultation. Kawerak, NEC and NVC strongly object to this process and to the incorporation of the TTPCC's comments into the draft regulations without explanation or response to our concerns and opposition. Kawerak, NEC and NVC raise

the same concerns and oppositions below, with respect to data required for proposed roads and requests that BIA/FHWA fully consider and address Kawerak and other tribal entities' concerns with these provisions.

Comments regarding Specific Provisions of the Draft Regulations:

We have comments and recommendations on the following sections:

Section 170.5 under the definition of National Tribal Transportation Facility Inventory (NTTFI) and Section 170.226 regarding what facilities are included in the NTTFI, include facilities "owned" by the BIA or a tribe. The last paragraph separately lists "primary access routes proposed by tribal governments..." This creates unnecessary confusion because it could be interpreted as meaning that proposed roads identified in the last paragraph of each Section are not considered to be "owned" by the tribe because they are listed separately. Clarification is required acknowledging that proposed roads are "owned" by tribes. To assert that a proposed road is not "owned" because it is not constructed is simply inaccurate. If this interpretation is applied, tribes will never be able to build new roads because "proposed routes" will not be considered "owned." The definition of "owned" means having the authority to finance, build, operate or maintain a facility regardless of what stage of development the facility is in. "Owned", needs to include proposed roads eligible for funding. Paragraph (7) of the definition of NTTFI in Section 170.5 and paragraph g. of Section 170.226, regarding primary access roads proposed by tribal governments, need to have an additional statement that "Routes included within this paragraph are also considered routes owned by Indian tribal governments as identified in paragraph (2)/paragraph b. herein."

Section 170.108 requires all regionally significant projects "must be" included in the Federal Lands Highways Program's (FLHP) TIP. Tribes cannot control the planning process of other state and federal entities. Tribes can nominate projects to the STIP and add them to the State Needs List. We recommend replacing "must" with "may". If this is a requirement, tribes will be at the mercy of state and federal agencies and could conceivably never be able to carry out projects unless the project is deemed a priority of the state or federal government. This is contrary to the principles of self-governance.

In Section 170.231 there is no process to appeal BIA/FHWA determinations regarding roads submitted for inclusion. This is a unilateral decision made by the agencies which affords no remedy for tribes to appeal such determinations. The process needs to have a well-defined and expedient appeal process that recognizes the intent of section 170.2 (h) & (i).

In Section 170.442(a)(5) clarify the definition of "exterior boundaries" to correspond to the Alaska Native Village service areas consistent with the service area boundaries established by the Indian Health Service and Regional Corporation boundaries under the Alaska Native Claims Settlement Act (ANCSA). This will clarify any ambiguous access issues and will comply with Alaska tribes' constitutional definitions of tribal territories.

In Section 170.442(a)(7), the regulation should state that the examples given for primary access roads are for illustrative purposes and not intended to be an exclusive list. The current and proposed regulatory provisions give examples that in the past have been interpreted by the government to be an exclusive list. If a road did not serve a purpose expressly identified in section 170.442(a)(7) it has been denied "primary access" designation. As an example of how this could have a negative impact, in Alaska and other northern states, ice roads are constructed and are primary access roads.

We have several concerns with respect to the structure, wording, and intent of Section 170.443:

- There is no authority for injecting an arbitrary separate process into the regulations that requires overly burdensome additional requirements regarding proposed roads. SAFETEA-LU and MAP-21 require the inclusion in the inventory of primary access roads proposed by tribal governments "for purposes of identifying the tribal transportation system **and determining the relative transportation needs of the Indian tribes...**". 23 U.S.C. 202(b)(2)(B). The statutory terms explicitly state that the only limitation upon a proposed primary access route for the purposes of identifying the tribal transportation system and of determining relative transportation needs of the tribes is that the proposed access route is the shortest practicable distance connecting two points of the proposed route (23 U.S.C. 202(b)(2)(C)). These legal clarifications were established in SAFETEA-LU and MAP-21 made no changes to these provisions. As a result, there is no authority to establish exceptional or more burdensome requirements for including proposed primary access roads on the NTTFI in order for such roads to generate funding than for any other roads. While the Secretaries may include "additional facilities" in the inventory if they are included in a "uniform and consistent manner nationally" (23 U.S.C. 202(b)(2)(D)), SAFETEA-LU and MAP-21 are unequivocal in eliminating agency discretion that would deny the inclusion of proposed primary access roads in the NTTFI for the purpose of determining the relative transportation need of tribes i.e., proposed primary access roads generate TTP funding to the same extent as other facilities listed in 23 U.S.C. 202(b)(2)(B)(i)-(vii).

The agencies' authority to exclude proposed roads from the inventory should be no greater than for existing roads. We object to having a separate process for inclusion of proposed roads at all. At a minimum, the process described in Section 170.443 should be limited to submission of proposed roads prospectively, for roads submitted following adoption of the revisions to the regulations. Proposed roads were submitted according to the program regulations of SAFETEA-LU. Consequently, the proposed roads in the currently locked tribal inventory should not have to go through the overburdened process as identified in 170.443. Exclusion of proposed roads from the inventory, which generates funding, will result in the "haves" having more and the "have-nots" having less resources to build roads.

- Because the agencies' authority to exclude proposed roads from the inventory should be no greater than for existing roads, we are also deeply concerned about the phrasing

of the proposed language in Section 170.443 in which the tribe must submit a range of documentation "for consideration". Rather than the phrase, "for consideration," we recommend "approved upon submittal", and explain the procedure as to what constitutes sufficiency in the documentation submitted. The process as currently written is for the submission of documents, at considerable expense to tribes, for the government's "consideration". We feel a process needs to be developed to prevent subjective, inconsistent, and arbitrary action by federal officials on inventory submissions.

- The Kawerak Transportation Program has completed Long Range Transportation Plans (LRTP) for the communities of: Brevig Mission, Little Diomedea, Elim, Gambell, Golovin, Koyuk, Mary's Igloo, Shaktoolik, Shishmaref, Solomon, St. Michael, Stebbins, Teller, Unalakleet, Wales and White Mountain. The LRTPs identify critical village transportation project needs and current and future construction projects. The majority of the roads in the LRTPs, including proposed roads, have already been accepted and are included within multiple State plans and documentation, including:

- "State of Alaska's Northwest Area Transportation Plan" by the Alaska Department of Transportation and Public Facilities
- "State of Alaska's General Land Status with RS 2477 Trails identified by the State of Alaska's Department of Natural Resources map
- "State of Alaska Proposed Access Corridors with Significant Mineral Resource Area" map identified for natural resource development
- "Western Alaska Access Planning Study Corridor Staging and Alternatives Report" by the State of Alaska Department of Transportation and Public Facilities DOTPF Project 60800 for intermodal connectivity and economic and natural resources development

Kawerak's proposed roads are well established and acknowledged in State plans, and there is no need to now arbitrarily subject these roads to unnecessarily burdensome documentation requirements.

If there are justifiable distinctions between requirements for proposed roads and existing roads that trigger the need for different documentation requirements, at a minimum the burden associated with the documentary support for those inventory submissions, should not be greater for proposed roads than for existing roads. The documentation requirements for proposed roads in Section 170.443 are substantially greater than for existing roads. We object to having separate documentation requirements at all. At a minimum, the documentation requirements described in Section 170.443 should be no greater than for existing roads, and limited to submission of proposed roads prospectively, for roads submitted following adoption of the revisions to the regulations. Further, if FHWA/BIA does include the proposed documentation requirements, they should define by example the extent of documentation required under the proposed section 170.443(a) thru (e). We are aware that the FHWA had specified the FHWA's "Procedural Guidelines for Feasibility Studies" as possible guidance for this documentation. We believe this would entail extensive, excessive, and costly

documentation. We strongly recommend that an example be prepared to illustrate your intent and that the parameters of that example replace the current draft terms in section 170.443(a)-(e).

- Section 170.443 establishes a BIADOT/FHWA Quality Assurance Team (QA Team) to which tribes must submit documentation in order to have a proposed facility “considered” for placement on the NTTFI. Nothing in MAP-21 authorizes a QA team to be established or to oversee this process and have authority to accept or reject proposed facilities for placement on the NTTFI. We object to arbitrarily subjecting such roads to a QA team. A QA Team comprised of federal employees approving the proposed roads may not be knowledgeable of rural Alaska and of our infrastructure needs or the means and methods of transportation in rural Alaska. At a minimum, we recommend that for the Alaska Region, a tribal member with knowledge of rural Alaska transportation infrastructure needs be placed on the QA team.

- The process in Section 170.443 also needs to have a well-defined and expedient appeal process that recognizes the intent of section 170.2 (h) & (i).

- Eliminate section 170.443(c). The proposed language would require our tribes to modify the plans of the Development of Transportation of the State of Alaska, Bureau of Land Management, National Park Service, and agencies of the Department of Defense to name a few. Most of these plans are updated once every five (5) to ten (10) years. In addition, the update processes do not, or are not required to take into consideration Indian self-determination and self-governance.

Technical issues: The inventory and coding guide needs to be updated to reflect that proposed roads are fully funded. GPR’s need to reflect construction costs in each region in Alaska.

We very much appreciate your consideration of Kawerak, Nome Eskimo Community and the Native Village of Council’s comments regarding the proposed draft revisions to 25 C.F.R. Part 170, and look forward to continued meaningful consultation working in partnership with FHWA and BIA to establish regulatory processes that will provide the tribes in our region the tools with which to successfully develop our transportation infrastructure needs.

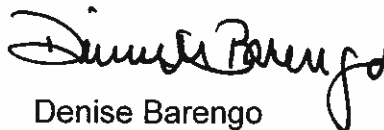
Sincerely,

Kawerak, Inc.,



Melanie Bahnke
President

Nome Eskimo Community



Denise Barengo
Executive Director

Native Village of Council



Chase Gray
Chief

cc: File



Ketchikan Indian Community

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May 30, 2013

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500-0004

The Honorable Secretary Ray LaHood,
US Department of Transportation
1200 New Jersey Ave, SE
Washington DC 20590

The Honorable Secretary Sally Jewell
US Department of Interior
1849 C Street, N.W.
Washington DC 20240

Re: Tribal Consultation on Draft Revision of Regulations
Governing the Tribal Transportation Program –
KIC Input Letter 2

Dear Secretary LaHood and Secretary Jewell:

Ketchikan Indian Community (KIC) is the Federally-Recognized Tribe for 5,712 tribal citizens who reside predominantly in the Ketchikan area. In addition to providing services to our tribal citizens and other American Indians and Alaska Natives, we also deliver a range of Tribal Transportation Program services under a FHWA Program Agreement which generally benefit 13,779 residents of the broader Ketchikan Gateway Borough.

KIC attended the May 14 consultation in Anchorage and at this time would like to provide additional input on issues raised during the session. First, KIC will discuss overarching issues regarding consultation and service delivery. This will be followed by discussion on the proposed regulations.

THE CONSULTATION PROCESS – OVERARCHING ISSUES

Negotiated Rulemaking

The Secretaries are generally charged with the responsibility to determine whether the use of a negotiated rulemaking process to write these MAP-21 regulations is in the public interest. MAP-21 does not prohibit the Secretaries from using negotiated rulemaking, it just does not mandate it. What is mandated, however, is that the Secretaries under the general negotiated rulemaking statute [5 USC 563(a)] assess whether “there are a limited number of identifiable interests that will be significantly affected by the rule” (i.e., tribes). Ketchikan Indian Community believes that the Federal Government’s trust responsibility REQUIRES negotiated rulemaking in this proposed rulemaking situation.

Tribal Consultation/Meaningful Input

While we strongly encourage negotiated ruling, if the Interior and Transportation Departments choose to continue with the rulemaking process that is underway, the Departments must strengthen tribal consultation efforts. MAP-21 is such a complicated piece of legislation, we strongly believe that in order for consultation to be meaningful, additional information MUST be provided to the tribes, including side-by-side comparisons highlighting language changes from the old to the proposed regulations, and spreadsheets detailing tribal allocation for the entire transition period.

Also, additional time should be dedicated to the task so that Tribes are not cut off as they try to ask questions to help them to understand the proposed changes and the associated technical and financial implications. The concept of meaningful consultation is supported by:

- Executive Order 13175 issued by President William J. Clinton on November 6, 2000, which established **regular and meaningful** consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes;
- Executive Order 12898 issued by President William J. Clinton on February 11, 1994 requiring that **each federal agency responsibility set forth under this order** shall apply equally to Native American programs;
- A Presidential Memorandum concerning Government-to-Government Relations with Native American Tribal Governments issued by President William J. Clinton on April 29, 1994, which **mandates tribal consultation to the greatest extent practicable**; and
- A November 5, 2009 Presidential Memorandum issued by President Obama **directing the Heads of Executive Departments and Agencies to develop and submit plans** detailing the

actions each agency will take to implement EO 13175 and to develop such plans in consultation with tribes.

KIC believes that the current proposed rulemaking action is inconsistent with President Obama's commitment to the tribes, our government-to-government relationship and the Federal Government trust responsibility.

Use of Federal Funds/Consultation at the State Level

The Interior and Transportation Departments have the responsibility for ensuring that consultation is met at the state levels where federal funds are being used. The transfer of money to the state for transportation projects doesn't relieve the Departments of the responsibility for ensuring that consultation with the Tribes is properly carried out. Please advise us as how this is being handled.

Trust Responsibility/Disparate Program Impacts

We believe that the Federal Government's trust responsibility obligates the Secretaries to report to the President and Congress on the disparate impacts of programs or legislation. We also believe that the responsibility for ensuring that discrimination does not occur in the delivery of services obligates the Secretaries, where there is a disparate impact, to protect those tribes that are being discriminated against. MAP-21 creates devastating impacts on Alaska tribes and tribes that are small and rural. There should be a mechanism for requesting the Secretaries review and report on this.

Long Term Funding

MAP-21 does not address the long-term funding needs of the Highway Trust Fund (HTF), the account from which Federal-Aid and Federal Lands Highway Programs are funded. Congress found interim solutions to HTF. Projections now show it will run short of funds sooner than expected. How will the Departments be addressing this?

ON THE DRAFT REGULATIONS

Since 2004, the Part 170 regulations have required the Secretary of the Interior to:

- Promote the rights of tribal governments to govern their own internal affairs;
- Provide direct transportation services from the Federal Government or to enter into agreements under which tribes would directly operate transportation programs serving tribal members;
- Encourage flexibility and innovation in the TTP;
- Reduce, streamline and eliminate unnecessarily restrictive, policies, guidelines, or procedures; and
- Ensure the continuation of trust responsibility.

KIC finds that many of the proposed changes to Part 170:

- Unnecessarily restrict tribal flexibility
- Fail to clearly authorize the direct transfer to tribes of federal-aid and state-administered highway safety funds
- Do not consistently reflect the FHWA's expanded role in the TTP
- Preclude tribal access to the BIA's PMO and PRAE funds.
- Deny tribes the right to challenge and appeal important agency determinations concerning tribal updates of facilities in the National Transportation Facility Inventory.

ISSUE AREAS

Federal-Aid or Other State, County and Municipal Funding

KIC believes that narrow reading of MAP-21 by the agencies constrains TTP streamlining. Tribes have advocated for years that FHWA has the authority under SAFETEA-LU, and now MAP-21, to lawfully transfer to an FHWA Program Agreement or to BIA for award to a tribe, any federal-aid or other state, county and municipal funds, including state highway safety funds that are "contributed" to tribes to help cover the costs of an eligible TTP project. Instead, provisions such as draft 170.926 limit the expanded use of TTP award instruments to ERFO (Emergency Relief for Federally-Owned Roads) funds only.

Categorical Exclusions

MAP-21 also expanded the class of activities eligible for a categorical exclusion under NEPA, but the draft regulations omit any reference to the eligibility of the most TTP-funded project to qualify for a categorical exclusion.

Primary Access Routes and Proposed Routes

After the passage of SAFETEA-LU (2005), the BIA and FHWA met with the IRR Program Coordinating Committee to draft amendments to the Part 170 regulations to reflect statutory changes to the IRR Program. However, the BIA did not publish the proposed changes to the IRR Program in the Federal Register for notice and public comment.

Consequently, the Part 170 regulations were not revised to reflect uniform criteria for adding "proposed routes" or "primary access routes" to the IRR Program inventory. Please advise us as to how this will be addressed.

Lack of Right to Challenge Formula Allocation

BIA and FHWA propose to eliminate formula data appeals in the draft rewrite of these Part 170 regulations. According to the BIA and FHWA, the new funding formula factors for allocating TTP funds ***"are based upon specific prior year data and may not be appealed."***

KIC believes strongly that tribes must be afforded the right to challenge BIA's allocation determinations. Given the nature of the TTP formula and its multi-year 'phase in' (2013-2016), the BIA's Office of Indian Services (which runs the TTP formula), may make mathematical and transcription errors in determining any Indian tribes TTP shares. Tribes should be able to file a challenge or appeal and require the BIA to demonstrate to the tribe's satisfaction that the calculation is accurate.

Inconsistent Reference to FHWA and FHWA's Program Agreement

In numerous instances throughout the entire draft Part 170 regulation, references to the expanded role of FHWA's statutory authority to contract directly with Indian tribes using Program Agreements under authority of title 23 of the United States Code are omitted. While we are confident that FHWA will continue to provide technical assistance and support to the more than 100 Indian tribes that have decided to contract the TTP directly from FHWA, the Part 170 regulations should reflect that the BIA and FHWA will both carry out functions in support of tribally assumed TTP PFSAs.

170.5 Definitions

Defining all agency PM&O and PRAE activities as governmentally inherent functions precludes tribal access to the BIA's PM&O and PRAE funds. Likewise other narrow definitions of BIA Road System (see KIC's first letter), Construction Contract, and National Tribal Transportation limit tribal flexibility.

Subpart C Funding

Key statutory provisions have been omitted: the 30 day limit for the BIA to transfer TTP share to tribes ((202(b)(4)(A)) or MAP-21's "catch-all" provision (202(b)(1)(D)) to authorize additional facilities in the NTTFI.

Subpart E Delivery of Service

Key statutory provisions have been omitted: the 30 day limit for the BIA to transfer TTP share to tribes ((202(b)(4)(A)) or MAP-21's "catch-all" provision (202(b)(1)(D)) to authorize additional facilities in the NTTFI.

170.700 et seq.

Counter to the federal commitment to tribal self-determination, the draft regulations add new enforcement and oversight provision in Subpart F.

Subpart G Maintenance Provisions

Counter to tribal self-determination and the Federal trust responsibility, the Departments have moved to restrict the use of BIA Road Maintenance Program funds to only BIA System (owned) roads and bridges (excluding tribally-owned roads and bridges).

170.601 et seq.

Self-determination contracts have been distinguished from all other forms of award in Subpart E. 170.602a of the enclosed draft Part 170 regulations provides that if a tribe assumes the Secretary of the Interior's duties for the TTP under a P.L. 93-638 contract, and experiences cost overruns in a construction project due to unforeseen circumstances, the tribe may request additional funds from the Secretary under 900.130(e).

We highlighted 170.602 to point out that contrary to what BIA and FHWA wrote in 170.602 b, every tribe has the ability to request additional funds from the Secretary of Interior, or Transportation, if they experience unforeseen circumstances.

Subpart D, Appendix C

We are curious why the agencies have chosen to retain the Cost-to-Construct tables including the 11 functional classifications of transportation facilities when they are no longer relevant in the formula.

Subpart H, Miscellaneous Provisions

We strongly support the ERFO amendments to allow such funds to be transferred to tribes using existing award instruments (FHWA Program Agreement, BIA's G2G Agreements, and 638 contracts and agreements. This should be expanded to include other governmental funds as discussed above.

IN CONCLUSION

Thank you for the opportunity to again provide input. KIC encourages the Departments to consider negotiated rulemaking as the avenue for implementing MAP-21. Short of that, we again encourage the Bureau of Indian Affairs and Federal Highways Administration to set aside more time for the tribal consultation process, and to make detailed information available to help the tribes to understand the technical changes and financial impacts of formula changes through the transition period to full implementation.

With all respect,



Irene Dundas, President
KIC Tribal Council

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MANDAN, HIDATSA & ARIKARA NATION

Three Affiliated Tribes * Fort Berthold Indian Reservation
Tribal Business Council

Office of the Chairman
Tex "Red Tipped Arrow" Hall

June 17, 2013

Via Electronic Mail Document Submission

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***Re: Comments on the Draft Revisions to the Indian Reservation Roads
Program Regulations, 25 C.F.R. Part 170***

Dear Mssrs. Gishi and Sparrow:

On behalf of the Mandan, Arikara and Hidatsa Nation, we offer the following comments in response to the Bureau of Indian Affairs (BIA) Federal Register Notice of April 12, 2013 (78 Fed. Reg. 21861), regarding Tribal Consultation on the Draft Regulations Governing the Tribal Transportation Program. We welcome the opportunity for dialogue with the federal government on these issues. The Mandan, Arikara and Hidatsa Nation is very concerned about the inadequacy of resources available to assist us in addressing the serious transportation infrastructure needs on our tribal lands. Our comments are structured to first highlight the considerations regarding the rulemaking and consultation process followed by a summary of key areas for consideration as the BIA and Federal Highway Administration (FHWA) further develop the draft rules. This summary identifies specific sections of the draft regulations that require additional development or rewriting.

operational processes that will be implemented as a result of MAP-21. No data has been shared with tribes to show the financial impact of the new law. The structure of the draft proposed regulation follows no programmatic or operational logic that a tribe operating under a FHWA or BIA administered program could identify. The policies, procedures, and authorities that both the administering agency and tribes must follow should be separately and specifically identified. Otherwise tribal sovereignty and tribal self-determination should be supported to the maximum extent possible.

We ask that the BIA and FHWA revise the rulemaking process to implement a tribal consultation process that offers tribes sufficient information to understand the authorities being exercised, the financial impact of the proposed rule on our tribal transportation program and a clear analysis of the DOI and BIA programs and requirements.

II. Substantive Issues

Below are our questions and comments regarding substantive issues and concerns raised by the draft 25 CFR Part 170 regulation provided as part of the April 12, 2013 notice.

1. The regulation should explain the fiscal rules in 23 USC §201(b) and impact on old money and projects.
 - a. Explain how the provisions of 23 USC §201(b) will impact funds distributed prior to MAP-21.
 - b. How can the funds that are not unexpended after 3 years be returned to the tribe?
 - c. What are the points of obligation for TTP funds?
 - d. How do tribal shares that are prior year funds under BIA management get transferred to a tribe that initiates a FHWA contract?
2. What rules apply to BIA and DOT administration of TTP?
 - a. The proposed regulation does not provide clear and consistent guidance to BIA and DOT program operations. We have concerns about inconsistent application of TTP rules in different BIA regions and this can be corrected by having regulations that apply across the agency.
 - b. Examples of areas that require federal agency regulation are right-of-way acquisition and management, appraisal, environmental review and tribal share allocation. Current right-of-way acquisition lacks a defined process for BIA processing right-of-way documents. The federal decision making process should be streamlined and consistent with levels of responsibility identified in the regulation.
 - c. Need a consistent regulation for acceptance of a completed road construction project into the BIA system.
3. Who is responsible for administering the rule?
 - a. The regulation should clearly identify the statutory authority it is exercising and the federal agency responsible for implementing and enforcing that regulation or activity. Currently the regulation mixes the various MAP-21 requirements into the regulations without identifying how the agency is to implement or oversee the activity.

4. How does the proposed rule impact LRTPs approved under the existing regulations?
 - a. How are tribes with existing LRTPs impacted regarding funding, inventory, and references to old funding categories? Will LRTPs developed under SAFETY-LU authority still be considered valid, and if not, when will they have to be revised?
5. Clarify 23 USC §201(c)(3) & (4) TTIP development and inclusion with state plans.
 - a. Tribes need further guidance on the meaning of regional significance and determining which projects should be subject to state and MPO participation.
 - b. Will this apply to rural planning organizations?
6. Clarify 23 USC §201(c)(5) asset management requirements and procedures.
 - a. MAP-21 requires the Secretary of Interior and Transportation to implement safety, bridge, pavement, and congestion management systems for facilities funded under the tribal transportation program in support of asset management. The proposed regulation does not follow this legislative requirement.
7. Clarify 23 USC §201(c)(6) authorities and activities and connection to P.L 93-638.
 - a. MAP-21 §201(c)(6) requires the Secretaries to collect and report data necessary to implement the tribal transportation program in accordance with the Indian Self Determination and Education Assistance Act, including inventory and condition information on tribal transportation facilities and bridge inspection and inventory information. This provision should be implemented in the regulations to identify the policies and procedures to be used in collecting and disseminating this data. The data should be provided to tribes on a regular basis in a format they can readily use.
 - b. Regulations should include provisions for tribes to contract for this activity and identify funding for this data collection function.
8. Does the Buy Indian Act and 7(b) apply to FHWA contracts? 202(a)(10)(B)
 - a. Are tribes that receive their TTP funds from FHWA subject to the requirements of 25 USC §202(a)(10)(B)?
9. Clarify 23 USC §§202(b)(1) and 201(c)(6)(b) – whose standard applies to inventory data collection?
 - a. MAP-21 Section 201(c)(6)(b) requires the Secretary of DOT to develop data collection standards which would include inventory data and Section 202(b)(1) requires the Secretary of the Interior to maintain the TTP Inventory. The proposed draft regulation does not contain the standards for data collection that Interior must follow in maintaining the TTP Inventory. These standards from DOT and policies and procedures on how the TTP Inventory will be maintained by DOI must be included as part of this regulation.
10. Rules for determining majority of AIAN residents.
 - a. 23 USC §202(b)(B)(v) allows the inclusion of public roads within tribal reservations, villages and communities in which the majority of residents are American Indians or Alaska Natives. The proposed rule does not provide a methodology for determining which public roads fall within this category.

11. Rule for dealing with undocumented ownership roads.
 - a. Many of the roads tribes have inherited from the BIA, states and counties do not have documented road right-of-way. The draft regulation does not address this significant issue that leaves tribes with the burden of researching easements and quieting title on many miles of roads. The draft regulation should address how the BIA will take responsibility for clarifying road ownership status and acquisition of right-of-way where such acquisition had not been performed.

12. Include a rule for identifying roads built with Highway Trust Funds since 1983.
 - a. Tribes are responsible for updating the road inventory data. 23 USC §202(b)(B)(iv) allows roads that were constructed or reconstructed with funds from the Highway Trust Fund under the Indian reservation roads program since 1983. The draft regulation should provide a process for BIA to follow to make this information available to tribes within a specific timeframe. A report that identifies the roads qualifying under this provision should be provided to tribes.

13. Rules for primary access routes
 - a. The draft regulation does not include a provision concerning the criteria for including or adding primary access routes to the new inventory. The draft rule should have included the criteria for adding or retaining a primary access route in the inventory for tribal consideration and comment. Primary access routes should be limited to avoid diversion of TTP funds to state and county roads.

14. Clarify scope and limitations of 23 USC §202(b)(2).
 - a. 23 USC §202(b)(2) provides that notwithstanding sections 563(a) and 565(a) of title 5, the Secretary of the Interior shall maintain any regulations governing the tribal transportation program. Within Sections 201 and 202 there are numerous provisions requiring standards and regulations to be developed by both DOT and DOI. The proposed regulation does not address the overall policies and procedures regarding program delivery between two federal agencies. In particular, the draft regulation does not implement 23 USC §202(b)(2). In past years the two agencies operated under a Memorandum of Understanding or Stewardship Agreement that clarified the authority and responsibilities of each agency in implementing the IRR Program. The regulations should address program administration for each agency including delegations of authority and guidance or policy responsibility. The regulation should address the role of BIA regarding tribes that choose to contract with FHWA, and tribes that contract with BIA obtaining services from FHWA.

15. How do proposed bridges get funded?
 - a. 23 USC §202(d)(2) creates a 2 percent set-aside for bridges. The draft regulations do not address this provision or provide a procedure for how those funds will be distributed. TTP Bridge Program regulations should either be included in the draft 25 CFR 170 regulations or be subject to a separate regulation. Consistent with Congressional intent in MAP-21 the 2 percent bridge set-aside should be limited to use for BIA and Tribal owned bridges.

16. Clarify tribal PS&E approvals under direct FHWA agreements.
 - a. Clarification is needed regarding 23 USC §202(b) (5) Health and Safety Assurances. The law recognizes tribal authority to approve plans, specifications and estimates on road and bridge projects with funds made available from the tribal transportation program through a contract or agreement under P.L. 93-638 under certain conditions. Does this allow tribes receiving funds directly from FHWA to exercise their PS&E approval authority?
 - b. The proposed regulations require a tribal resolution be submitted with each PS&E package but that requirement is not in the legislation and it should be removed as unduly prescriptive. Tribes should be able to adopt their own processes and procedures for submission of PS&E packages.

17. Clarify difference between 23 USC §§202(b)(6)(a)&(b) and 202(b)(7)(a)&(b)
 - a. Please provide clarification on the difference between 23 USC §§202(b)(6)(A)&(B) and 202(b)(7)(A)&(B). Both provisions refer to contracts and agreements with Indian tribes. These provisions are not reflected in the draft regulations.

18. Clarify 23 USC §202(b)(7)(D) – is this the authority for direct FHWA contracts?
 - a. Under 23 USC §202(b)(7)(D) FHWA is authorized to enter into funding agreements with tribes to carry out a tribal transportation facility program or project under subparagraph (A). Subparagraph (A) refers to agreements authorized under P.L. 93-638. Are the agreements entered into between a tribe and FHWA considered P.L. 93-638 agreements, even though P.L. 93-638 does not apply to the Department of Transportation? This question is important because of the role tribes take in replacing the BIA in operating a funded BIA program or project and their protection from liability under the Federal Tort Claims Act.

19. Clarify 23 USC §202(b)(7)(J) – what authority (law) exists to authorize DOI to provide transportation services?
 - a. 23 USC Section 202(b)(7)(J) provides for transfer of remaining funds from a terminated Tribal-FHWA contract to the BIA and for the BIA to provide continued transportation services in accordance with applicable law. Under MAP-21, there is no longer a direct BIA road program and all of the program authority is assumed to be passed on to tribes except for inherent federal functions. What legislative authority exists for BIA to engage in activities under the Tribal Transportation Program outside of their inherent federal functions?

20. Explain administration of 23 USC §§202 and 201 planning – TTIP approvals.
 - a. There are two seemingly conflicting and inconsistent transportation planning provisions for the Tribal Transportation Program in 23 USC §201 (c) and 202(c). Section 201(c) requires:
 - i. the Secretaries of DOT and DOI to implement transportation planning procedures for TTP facilities that are consistent with statewide and metropolitan planning organization planning processes

- ii. Secretary of DOT approval of tribal transportation improvement programs
 - iii. Joint DOT and DOI asset management systems and
 - iv. Joint DOT and DOI data collection and reporting for road and bridge inventory and bridge inspection.
- b. Section 202(c) creates a 2 percent set-aside for tribal transportation planning and requires tribes to carry out a transportation planning process in accordance with §201(c). It also states that funded projects must be selected by tribes from the transportation improvement program and subject to approval of the Secretaries of Interior and DOT.

The draft regulations do not reflect the requirement in 23 USC §201(c) for approval of tribal transportation improvement programs. Rather the draft regulations create a process for development and approval of a TTPTIP that is not authorized by the legislation. There should be a clear process for development and approval of tribal TIPs, including clear review and approval criteria. The draft regulation does not define how the federal agencies will conduct transportation planning in the absence of a tribal 638 contract. The draft regulations should provide more clarification on the transition between the prior IRR TIP process and the new TTPTIP.

21. How will 23 USC §202(d)(3)(a) requirement for 20 feet opening be applied to culverts?
- a. 23 USC §202(d) authorizes a tribal bridge program. The eligibility criteria do not address multiple box and pipe culverts. What are the eligibility requirements for multiple box and pipe culverts?
22. How will 23 USC §202(f) be implemented and which agency has administrative responsibility for compliance?
- a. 23 USC 202(f) makes it mandatory for the Secretary of Transportation to determine that the obligation of TTP funds for a Federal Aid project is supplementary to and not in lieu of the obligation of a fair and equitable share of funds apportioned to the State under section 104 before approving that project on a tribal transportation facility. The draft regulation does not address this statutory requirement. What policies and procedures will be developed to carry out this requirement?

Tribal Transportation Program Implementation and the Indian Self-Determination and Education Assistance Act

In MAP-21, Congress has authorized that, upon the request of a tribal government, "**all** funds made available through the Secretary of the Interior under this chapter and section 125(e) for tribal transportation facilities . . . **shall** be made available . . . in accordance with the Indian Self-Determination and Education Assistance Act." 23 U.S.C. 202(b)(6)(A). The authorization extends to the Secretary of Transportation pursuant to 23 U.S.C. 202(b)(7)(A). In MAP-21, as in SAFETEA-LU (and, with respect to the Secretary of Interior, in the Transportation Equity Act for the 21st Century [TEA-21]), Congress left the Agencies no discretion to deny the request of a tribal government to enter into a contract or agreement for the Secretary to provide tribal transportation program funding for the tribal government to carry out Tribal Transportation Program (TTP) (formerly IRR programs), programs, services, functions, or activities (PFSAs) under the ISDEAA. Congress specifically explained its intent

to clarify the applicability of the ISDEAA to the IRR Program in SAFETEA-LU. In the Joint Explanatory Statement of the Committee on Conference (H.R. 3, Section 112), the Committee stated as to its authorization and requirement for ISDEAA contracts and agreements that:

"This section was added to the United States Code in TEA 21. The Committee felt at that time that the congressional intent with regard to tribal contracting authority was clear. Unfortunately, the Committee now believes the full intent of the TEA 21 amendments has not been fulfilled. This subsection aims to clarify the intent of the Committee on this important point for the Indian tribes."

The statutory terms in MAP-21 are consistent with those enacted in SAFETEA-LU (and, with respect to the Secretary of Interior, consistent with TEA-21). Yet, the BIA and FHWA draft Part 170 regulations contain numerous provisions that fail to conform to the express Congressional mandate set forth in the statute.

Tribes have successfully used their authority under the ISDEAA and the FHWA Program Agreements entered into in accordance with the ISDEAA, to build capacity and more efficiently address their transportation needs. The accomplishments made are consistent with the existing regulation in Section 170.103, which sets forth the goals and principles that must guide development of the revised regulations. Of particular note, subsection (b) directs the Secretaries to promote the rights of tribes to govern their internal affairs, and subsections (f) and (g) require the Secretaries to encourage flexibility and innovation in the implementation of the program and to reduce, streamline, and eliminate unnecessarily restrictive policies, guidelines, and procedures. Further, when formulating and implementing policies that have tribal implications, Executive Order 13175 requires agencies to (i) encourage tribes to develop their own policies to achieve program objectives; (ii) where possible, defer to tribes to establish standards; and (iii) consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards to preserve the prerogatives and authority of tribes. Absent good cause, the revised Part 170 regulations should, therefore, continue to promote the ability of tribes to govern the administration of their transportation programs without federal interference, develop alternative tribal policies and standards, and encourage flexibility and innovation.

Despite the statutory mandate, the principles set forth in the regulations and Executive Order, and the demonstrated record of success; the proposed revised regulations would restrict tribal flexibility and interfere with the ability of tribes to administer transportation programs as discussed below. A number of the draft revisions to the Part 170 regulations back away from the principles of self-government and tribal flexibility and, without legal basis, seek to increase the applicability of federal standards and procedural requirements.

- The draft regulations would establish a new BIA and FHWA authority to review and monitor the performance of all TTP activities, conduct formal review of tribal transportation programs, and require tribes to submit, within 60 days, a corrective action plan for BIA or FHWA approval (see §§ 170.702 – 170.704). These new sections would significantly expand the authority of the federal agencies to monitor tribal programs beyond that permitted under ISDEAA and would conflict with the authority of tribes to govern their program under and in accordance with ISDEAA. Any sections describing such federal authority should be explicitly subject to, and restricted by, the ISDEAA and the ISDEAA regulations.

- As drafted, the new regulations would establish a new FHWA approval process that will delay and interfere with the existing authority of tribes to develop and use alternative

tribal design standards. Under the current regulations, tribes are expressly permitted to incorporate the use of alternative tribal design standards in their ISDEAA agreements. Section 170.454 and Appendix B to Subpart D have been revised to remove this authority and require tribes to seek separate FHWA approval for alternative standards. This change, which would directly interfere and conflict with ISDEAA and is not supported by statutory changes in MAP-21, should be stricken and the regulations should reflect the continued authority of tribes to include alternative design standards in their ISDEAA and program agreements. Similar concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (*see* § 170.450 and Appendix A to Subpart D) (this regulation and appendix should also be amended to reflect the new categorical exclusions for projects under \$5 million); and the assumption of TTP functions (*see* § 170.610).

- We understand that a large number of tribes have recently entered into BIA Program Agreements (also known as Government-to-Government agreements), but the draft revised Part 170 regulations decline to directly address these agreements in regulation. The Secretary should provide a clear explanation to tribes regarding the agency's interpretation of the legality and authority for these agreements. If such authority does not exist a clear statement to that effect will assist to focus our attention to ISDEAA provisions. These agreements are grounded in the Secretary's authority under 23 U.S.C. § 202(a)(2), which does not reference the ISDEAA. However, these agreements purport to incorporate certain aspects of the ISDEAA, and the regulations should ensure that these agreements, if authorized, are implemented consistent with the TTP goals and principles set forth in 25 U.S.C. § 170.103, especially subsections (b), (c), (e), (f), and (i), and the principles of the ISDEAA. Thus, we recommend that the regulations establish regulations specific to these agreements, which will ensure tribes the benefits and protections inherent in these principles.

- Revised provisions fail to recognize the authority of tribes to reallocate funds to a construction project with unforeseen construction costs (*see* § 170.602).

We further call on the BIA to consider and adopt regulations to address longstanding obstacles to implementation of agreements under Title I of ISDEAA, so that upon tribal request, "*all* funds made available through the Secretary of the Interior ... for tribal transportation facilities ... *shall* be made available... in accordance with the Indian Self-Determination and Education Assistance Act." 23 U.S.C. 202(b)(6)(A).

DOI established a template Title IV addendum and worked with tribes to establish a draft template Title I agreement. However, the Department has failed to approve a Title I template that authorizes tribes to include all program funding and contractible activities in such an agreement. Rather than resolve internal management issues, the BIA developed an alternative contracting mechanism outside of ISDEAA (known as BIA government to government agreements). There is no clear authority for such agreements. While the development of government to government agreements allows tribes, who do not wish to enter into a self-governance agreement, to assume the entire program, it is not a Title I ISDEAA agreement and it does not relieve the Secretary of her obligation to enter into appropriate Title I agreements that include all contractible activities and we request that the regulations include a section or sections that direct the BIA to enter into such agreements and address any internal obstacles thereto.

Delays in the Delivery of Funding Must be Addressed

Section 170.600, notice of funds availability, has been substantially revised to address changes made in MAP-21, but it does not address the perennial failure of the BIA to timely distribute tribal transportation funds in accordance with the statute. MAP-21 retains the statutory mandate that the Secretary of the Interior distribute funds to the tribes no later than 30 days after the date on which such funds become available (*see* 23 U.S.C. 202(b)(4)(A)). The current system is clearly not working, and the BIA should use this regulatory revision process to address the problem and ensure compliance with the statute. Distribution of TTP funds is BIA's primary responsibility in this new program and there should be full accountability and transparency in that process. BIA input is needed to identify the existing problems, but we request that a new section be added to the Part 170 regulations that directs the BIA to allocate appropriate tribal funds to the Regional offices and Office of Self-Governance within 15 days of the date that they become available to the BIA, and that these offices be required to distribute such funds in accordance with applicable agreements within the 30-day period. If the funds are not transferred within the statutory deadline, prior to the deadline, the BIA should be required to provide the Tribe written notice describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

Eligible Uses of TTP Funds

MAP-21 sets forth the allowable uses of TTP funds in 23 U.S.C. § 202(a)(1). The proposed revised regulations, however, fail to reflect this statute. In particular Section 170.115 and Appendix A to Subpart B set out the eligible activities without citing to or restating the eligible uses set forth in Title 23. The list of eligible activities is unduly restrictive and prescriptive regarding the diverse issues and needs that arise in tribal transportation programs. Such a list is more appropriate for a "best practices guidebook" or similar document but not in regulations. We request that § 170.115 be revised to include the allowable uses set forth in § 202(a)(1), which include certain specific activities, operation and maintenance of transit program and facilities that are located on, or provide access to, tribal land, or are administered by a tribal government, and any transportation project eligible for assistance under this title that is located within, or that provides access to, tribal land, or is associated with a tribal government. Congress clearly intended to provide TTP funds for tribes to address their transportation needs as identified by the tribe and to be flexible in the use of those funds. Transportation is a constantly evolving field and the ability of tribes to take advantage of new strategies and technologies will be greatly limited if we are limited to the prescriptive list of activities in the proposed rule.

National Tribal Transportation Facility Inventory (NTTFI)

The NTTFI would be developed through the entry of data by the BIA Regional offices, as is the existing IRR inventory. Over the past several years, tribes have expressed concern, however, that the BIA Regional offices apply different processes and standards for determining what facilities may be included on the inventory. We request, therefore, that the development of the NTTFI be governed by a uniform BIA policy applicable to all regional offices with effective

appeal processes that facilitate consistent application of that uniform policy.

Consultation, Collaboration, Coordination

Section 170.101 sets out a number of activities that trigger a requirement for consultation, collaboration, and coordination among tribe, federal, state, and local governments. We recommend that this list be amended to expressly include the following additional activities: (i) developing new or amended regulations or policies that affect the administration of programs or statutory provisions that affect the tribes or tribal transportation programs; (ii) developing template ISDEAA or Program Agreements; and (iii) accepting cooperation of states and local governments and crediting of any funds received from a state, county, or local subdivision for a tribal program in accordance with 23 U.S.C. § 202(a)(9). This last item should set out how such funds will be credited to a tribe and the process for a state, county, or local subdivision to provide funds through this process.

Section 170.102 sets forth the manner in which the Departments shall consult, collaborate, and coordinate with tribal governments. In the past the agencies have been unduly influenced by the aggressive political tactics employed by a few tribes to alter the IRR program in their favor without first consulting tribes. In light of the BIA and FHWA failure to provide written responses to tribal comments on proposed policy changes, we request that this be revised to require that the Secretaries provide written responses to written tribal comments submitted in any consultation process, and that all tribes have the opportunity to comment on the Secretaries' responses. Resolution of any conflicts should reflect Congressional intent to focus TTP resources on supporting BIA and tribally owned transportation infrastructure.

BIA Road Maintenance Program

Existing regulations (25 C.F.R. § 170.803) identify four categories of transportation facilities that are eligible for maintenance under the BIA Road Maintenance Program: (1) BIA transportation facilities listed in the regulation; (2) non-BIA transportation facilities if maintenance is required to ensure public health, safety, and economy; (3) tribal transportation facilities; and (4) other transportation facilities as approved by the BIA. The draft revision of this section provides that *TTP funds* can be used for maintenance of TTP facilities on the NTTFI, but it would restrict the use of BIA Road Maintenance Program funds to the maintenance of only BIA transportation facilities and other transportation facilities as approved by the Secretary. This restriction on the use of TTP funds reflects the intent of Congress but should be expanded to include tribally owned roads and bridges, which are similarly situated with BIA owned roads and bridges.

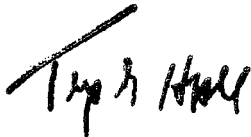
In addition, the draft revised regulations omit sections of the existing regulations that address the maintenance standards and the BIA's obligations to notify the Transportation Department and the owners of transportation facilities if it determines that an IRR transportation facility is not being properly maintained due to insufficient funding. See 25 C.F.R. § 170.811. Because non-BIA and non-tribal roads will no longer generate funding under the new formula in MAP-21, it is increasingly important that states and local governments maintain their transportation facilities, which are located on tribal lands or provide access to tribal communities. If such roads were constructed with Federal-aid Highway funds, 25 U.S.C § 116 mandates their maintenance, and if the facility is not properly maintained, that section directs the Transportation Secretary to contact the state or other direct recipient. Further, if the maintenance deficiency is not corrected within 90 days, the Secretary is directed to withhold approval of further projects until it is resolved.

Additionally, standard rights-of-way on tribal lands generally require the grantee to maintain the right-of-way, unless the tribe has agreed otherwise, and the Interior Secretary is authorized to terminate the right-way-way grant failure to comply with any term or condition of the grant. See 25 C.F.R. § 169.20. If a grantee does not correct the deficiency within a 30-day notice period, the Secretary is directed to terminate. Although these maintenance requirements already exist, tribes do not have a mechanism to seek their enforcement. We, therefore, recommend that the revised regulations provide a regulatory process by which tribes may request a BIA or FHWA review of maintenance on roads owned by another public authority. Further, if maintenance on a non-tribal or BIA-owned transportation facility is found to be deficient, we recommend that the revised regulations direct the Secretaries to notify the road owner of the deficiencies and take steps to enforce applicable maintenance requirements in accordance with 23 U.S.C. § 116 or the applicable right-of-way agreement.

III. Conclusion

We appreciate your consideration of these tribal comments and we look forward to a written response to them. If the Departments proceed with a Notice of Proposed Rulemaking, we request that you provide your written response prior to publishing the Notice of Proposed Rulemaking and that we be afforded the opportunity to respond to any comments

Respectfully,

A handwritten signature in black ink, appearing to read "Tex 'Red Tipped Arrow' Hall". The signature is written in a cursive, somewhat stylized font.

Tex "Red Tipped Arrow" Hall, Tribal Chairman
Mandan, Hidatsa & Arikara Nation