Sparrow, Robert (FHWA)

From: Tanya Kingsley <tanya@rezta.com>
Sent: Monday, May 20, 2013 2:07 PM
To: leroy.gishi@bia.gov; Sparrow, Robert (FHWA)
Cc: Tony Largo
Subject: COMMENTS ON 25 CFR PART 170 REGULATIONS
Attachments: SReservatio13052011040.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Gentlemen,

Accordance to your Phoenix, AZ meeting your request was to have the comments be sent to you by electronically. The original have already been sent by mail.

Thanks,
Tanya

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COMMENTS ON 25 CFR PART 170 REGULATIONS

DISCUSSION DRAFT

COMMENTS ON 25 CFR PART 170 REGULATIONS

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

These comments are structured so as to first highlight the considerations regarding the rulemaking and consultation process. This discussion is 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.

I. The Rulemaking and Consultation Process

Although MAP-21 does not expressly mandate the use of negotiated rulemaking to revise the Part 170 regulations, the revision of these regulations must be conducted in compliance with the Department of the Interior's (the Department) tribal consultation and collaboration responsibilities under Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), the IRR program regulations (25 C.F.R. Part 170) and the Departments' tribal consultation plans. Section 5 of Executive Order No. 13175 obligates 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 implementation of MAP-21 Tribal Transportation Program (TTP) regulations relate directly to tribal governments' authority and capability to construct, maintain and operate safe and reliable transportation facilities serving their members and their lands and resources. The delivery of transportation infrastructure is undisputedly an essential governmental function that has vital impact upon the health, safety and economic well-being of tribal communities that triggers the Department's obligations under Executive Order 13175.

When undertaking transportation activities affecting tribes, the 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 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 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 notice indicates that the BIA may schedule further consultations at different or additional locations after the Notice of Proposed Rulemaking is published. The tribal consultation process described in the April 12 notice and that will govern this Part 170 revision not only contrasts markedly with the consultation and collaboration offered by negotiated rulemaking, but it also falls far short of 13 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

Although the April 12 notice asserts that it is necessary to revise the Part 170 regulations, it provides no indication that the BIA and FHWA explored or even considered the use of negotiated rulemaking to revise the Part 170 regulations, and the notice articulates no basis for declining to use such a process to revise the Part 170 regulations. As currently set forth, the process described in the April 12 notice fails to meet the standards established in Executive Order 13175.

While we understand that MAP-21 effectively overrides the existing Part 170 Relative Need Distribution Formula, MAP-21 establishes a new formula that leaves little, if any, room for regulatory interpretation, and neither the formula changes nor the name changes require a rushed regulatory process that offers such a limited opportunity for tribal input. Indeed, the Part 170 revision will also need to consider regulatory updates to address statutory changes from the SAFETEA-LU authorization of 2005 that have been retained in MAP-21. Following the SAFETEA-LU authorization, the Agencies engaged with tribes in a preliminary process to develop proposed revisions to Part 170. Although draft revisions were developed, the Departments never felt compelled to present that collaborative draft for tribal consultation notice, nor proceed with a Notice of Proposed Rulemaking (NPRM).

We request that the BIA and FHWA reconsider and 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 the opportunity to develop a consensus rule or an interim rule. If the Departments are not willing to use a negotiated rulemaking process, at the bare minimum, the tribal consultation process should not only offer tribes the opportunity to provide comments to draft revisions, it should ensure that the BIA and FHWA will make all tribal comments available to tribes and provide a written response to those comments before publishing a Notice of Proposed Rulemaking.

Comment [svq1]: Request for negotiated rulemaking or more opportunities for tribal consultation.

MAP-21 was enacted in the face of Federal Highway Trust Fund and other fiscal constraints. In light of these fiscal circumstances, MAP-21 received only a two-year authorization period. Given these limitations, we question the Agencies' devotion of

limited federal transportation resources to this regulatory revision, particularly with respect to any change of the Part 170 regulations that alters the terms established pursuant to negotiated rulemaking unless it is required by statutory modification by MAP-21.

II. Substantive Issues

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

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 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 TTP (formerly IRR) 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.

Comment [svq2]: Revised draft regulations are not consistent with statutory mandates of MAP-21.

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.

Comment [svq3]: Increased tribal control of their transportation programs without federal interference should be primary goal of Part 170 regulations.

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.

Comment [svq4]: New sections regarding federal monitoring should be subject to the ISDEAA and 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

Comment [svq5]: New FHWA approval process creates delays and interferes with tribes' authority to develop and use alternative design standards.

concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (*see* § 170.450 and Appendix A to Subpar 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).

- The draft regulations would subject the FHWA and BIA program agreements to new regulatory requirements which are inconsistent or contrary to the ISDEAA. Although MAP-21 explicitly authorizes the Secretary of Transportation to enter into agreements with Indian tribes in accordance with the ISDEAA, the draft revised regulations include a number of changes that decline to extend ISDEAA protections and benefits to tribes with such agreements (see, e.g. §§ 170.461 (tribal approval of PS&E packages), 170.471 (contract monitoring), 170.472 (recordkeeping), 170.474 (project closeout), 170.619 (Indian preference), 170.617 (inclusion of contingencies in budgets), 170.621 (remedies if a tribe fails to substantially perform); 170.625 and 626 (requests for waivers); and 170.934 (resolving disputes). We recommend that the regulations extend these ISDEAA references to FHWA Program Agreements and include regulations for BIA Program Agreements (government to government agreements) that reflect the principles of ISDEAA and the goals and principles set forth in 25 U.S.C. § 170.103, especially subsections (b), (c), (e), (f), and (i).

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

Comment [svq6]: It should be made clear in the regulations that ISDEAA protections and benefits extend to the BIA G2G agreements with tribes. (This is a major issue for the RTA and should be emphasized.)

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 PSFAs 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). 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 PSFAs, 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.

Comment [svq7]: BIA should continue to enter into Title I ISDEAA agreements and the regulations should direct the BIA to do so and to establish an appropriate Title I agreement template.

Delays in the Delivery of Funding Must be Addressed

Comment [svq8]: Timely allocation and delivery of funding is essential to the operation of tribal transportation programs, especially for tribal consortia, such as RTA, which consolidate the annual share allocations of a large number of tribes in operating their tribal transportation programs.

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 that 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, 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. We request that § 170.115 be revised to include, in addition to the existing provisions, a new subsection that restates 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. It is also important that Appendix A to Subpart B be modified to use the correct defined terms to ensure that the appendix is consistent with the eligible statutory uses of TTP funds. Generally, this appendix has been revised to replace the term "IRR roads" with "tribal transportation facilities" or the undefined term "TTP transit facilities." To be consistent with the statute we request this appendix use the term "***transportation facilities in the TTP system***." Similar attention to the definitions is required in a number of sections of the revised regulations to ensure consistency with the eligible uses of funds in the statute.

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. Tribes may also consider requesting that paragraph (5), which addresses the development of environmental mitigation measures to protect Indian lands and the environment, be amended to include a reference to tribal cultural resources.

Comment [svq9]: The list of activities that trigger the requirement for consultation, collaboration, and coordination should be expanded.

Section 170.102 sets forth the manner in which the Departments shall consult, collaborate, and coordinate with tribal governments. 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 tribes have the opportunity to comment on the Secretaries responses. Where there are substantive disagreements between the agencies and the tribe, or between the tribes, we recommend that Section 170.102 provide that the Secretaries will seek a resolution in accordance with the goals and principles set forth in Section 170.103.

Comment [svq10]: Changes are needed to the manner in which the Department (BIA) responds to tribal comments on proposed policy changes, especially where there are substantive disagreements.

BIA Road Maintenance Program

Sections governing the use of the BIA Road Maintenance Program funding (§§ 170.801 and 170.803) have been revised significantly to restrict this BIA program to maintaining only BIA-owned facilities. This change is a substantial limitation of the existing use of BIA road maintenance program and appears contrary to 202(a)(8)(B), which requires the BIA to retain primary responsibility for the BIA road maintenance program and to ensure that TTP funding made available under Title 23 is supplementary

Comment [svq11]: The restriction on the use of BIA Road Maintenance Program funding to BIA-owned facilities should be rejected, especially as to those situations where the lack of maintenance of the non-BIA or Tribal transportation facilities threatens the public health and safety of tribal members

to, and not in lieu of, any obligation of funds by the BIA for road maintenance programs. The existing regulations (25 C.F.R. § 170.803) set forth four categories of facilities that are eligible under the program. In addition to BIA-owned roads, the existing regulation permits BIA maintenance funds to be used for two additional categories of transportation facility: (i) "[n]on-BIA transportation facilities if the tribe served by the facility feels that maintenance is required to ensure public health, . . .;" and (ii) "Tribal transportation facilities such as public roads, highways bridges,. . ." Those facilities should remain eligible under the revised regulations. Historically this program has benefited tribal-owned roads. Additionally, although federal-aid highway program constructed roadways must be maintained by the facility owner (23 U.S.C. § 116), we understand that there may be roads providing access to tribal communities that have not received the benefit of improvement under the federal-aid highway program. Where lack of road maintenance threatens the public health and safety of tribal members, the tribes should continue to be permitted to use BIA road maintenance funds to address those conditions, in a manner permitted under the existing regulation. The proposed changes would deprive tribes of the ability to use these funds on these two categories of roads that are not BIA-owned, effectively requiring tribes to divert their TTP funds to cover the cost of maintenance activities that would be eligible for BIA road maintenance funds under existing regulations.

SUSANVILLE INDIAN RANCHERIA

May 27, 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 Susanville Indian Rancheria ("Tribe"), I 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. The Tribe welcomes the opportunity for dialogue with the federal government on these issues. These comments are structured so as to first highlight the considerations regarding the rulemaking and consultation process. This discussion is 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.

I. The Rulemaking and Consultation Process

Although the Moving Ahead for Progress in the 21st Century Act (MAP-21) does not expressly mandate the use of negotiated rulemaking to revise the 25 C.F.R. Part 170 regulations, the revision of these regulations must be conducted in compliance with the Department of the Interior's (the Department) tribal consultation and collaboration responsibilities under Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), the IRR program regulations (25 C.F.R. Part 170) and the Departments' tribal consultation plans. Section 5 of Executive Order No. 13175 obligates 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 implementation of the MAP-21 Tribal Transportation Program (TTP) regulations relate directly to tribal governments' authority and capability to construct, maintain and operate safe and reliable transportation facilities serving their members and their lands and resources. The delivery of transportation infrastructure is undisputedly an essential governmental function that has vital impact upon the health, safety and economic well-being of tribal communities that triggers the Department's obligations under Executive Order 13175.

When undertaking transportation activities affecting tribes, the 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 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 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 notice indicates that the BIA may schedule further consultations at different or additional locations after the Notice of Proposed Rulemaking is published. The tribal consultation process described in the April 12 notice that will govern this Part 170 revision not only contrasts markedly with the

consultation and collaboration offered by negotiated rulemaking, but it also falls far short of 13 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

Although the April 12 notice asserts that it is necessary to revise the Part 170 regulations, it provides no indication that the BIA and FHWA explored or even considered the use of negotiated rulemaking to revise the Part 170 regulations, and the notice articulates no basis for declining to use such a process to revise the Part 170 regulations. As currently set forth, the process described in the April 12 notice fails to meet the standards established in Executive Order 13175.

While the Tribe understands that MAP-21 effectively overrides the existing Part 170 Relative Need Distribution Formula, MAP-21 establishes a new formula that leaves little, if any, room for regulatory interpretation, and neither the formula changes nor the name changes require a rushed regulatory process that offers such a limited opportunity for tribal input. Indeed, the Part 170 revision will also need to consider regulatory updates to address statutory changes from the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) authorization of 2005 that have been retained in MAP-21. Following the SAFETEA-LU authorization, the Agencies engaged with tribes in a preliminary process to develop proposed revisions to Part 170. Although draft revisions were developed, the Departments never felt compelled to present that collaborative draft for tribal consultation notice, nor proceed with a Notice of Proposed Rulemaking (NPRM).

The Susanville Indian Rancheria requests that the BIA and FHWA reconsider and revise the regulatory process set forth in the April 12, 2013 notice to provide either negotiated rulemaking process or some other collaborative consultation process that offers tribes the opportunity to develop a consensus rule or an interim rule. If the Departments are not willing to use a negotiated rulemaking process, at the bare minimum, the tribal consultation process should not only offer tribes the opportunity to provide comments to draft revisions, it should ensure that the BIA and FHWA will make all tribal comments available to tribes and provide a written response to those comments before publishing a Notice of Proposed Rulemaking.

MAP-21 was enacted in the face of Federal Highway Trust Fund and other fiscal constraints. In light of these fiscal circumstances, MAP-21 received only a two-year authorization period. Given these limitations, the Tribe questions the Agencies' devotion of limited federal transportation resources to this regulatory revision, particularly with respect to any change of the Part 170 regulations that alters the terms established pursuant to negotiated rulemaking unless it is required by statutory modification by MAP-21.

II. Substantive Issues

Below are the Tribe's comments regarding substantive issues and concerns raised by the draft revised Part 170 regulation provided as part of the April 12, 2013 notice.

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 Subpar 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).

- The draft regulations would subject the FHWA and BIA program agreements to new regulatory requirements, which are inconsistent or contrary to the ISDEAA. MAP-21 explicitly directs the Secretary of Transportation, upon the request of a tribal government, to enter into an agreement *in accordance with the ISDEAA* making available all funds available to the tribal government under Chapter 2 of Title 23. *See* 23 U.S.C. § 202(b)(7)(A). The draft revised regulations, however, include a number of changes that decline to extend ISDEAA protections and benefits to tribes with FHWA Program Agreements (see, e.g. §§ 170.461 (tribal approval of PS&E packages), 170.471 (contract monitoring), 170.472 (recordkeeping), 170.474 (project closeout), 170.619 (Indian preference), 170.617 (inclusion of contingencies in budgets), 170.621 (remedies if a tribe fails to substantially perform); 170.625 and 626 (requests for waivers); and 170.934 (resolving disputes). The Susanville Indian Rancheria recommends that the regulations expressly extend these ISDEAA references to FHWA Program Agreements.

- The Susanville Indian Rancheria understands 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. 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 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, the Tribe recommends 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).

The Susanville Indian Rancheria further calls 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 PSFAs 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). 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 PSFAs, and the Susanville Indian Rancheria requests 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. BIA input is needed to identify the existing problems, but the Tribe requests 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, the Susanville Indian Rancheria recommends 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 Susanville Indian Rancheria requests that § 170.115 be revised to include, in addition to the existing provisions, a new subsection that restates 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. It is also important that Appendix A to Subpart B be modified to use the correct defined terms to ensure that the appendix is consistent with the eligible statutory uses of TTP funds. Generally, this appendix has been revised to replace the term "IRR roads" with "tribal transportation facilities" or the undefined term "TTP transit facilities." To be consistent with the statute the Susanville Indian Rancheria requests this appendix use the term "***transportation facilities in the TTP system.***" Similar attention to the definitions is required in a number of sections of the revised regulations to ensure consistency with the eligible uses of funds in the statute.

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. Some tribes, not all, have access to the Roads Inventory Field Data Module (RIFDS) and it is imperative that the BIA Regional offices provide technical assistance to all tribes so that they will also have access to enter roads into the National Tribal Transportation Facility 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. The Tribe requests, therefore, that the development of the NTTFI be governed by a uniform BIA policy applicable to all regional offices and all tribes with effective appeal processes that facilitate consistent application of that uniform policy. With the MAP-21 formula being limited to the FY 12 Inventory for the mileage factor, tribes must be notified on what roads, based on the uniform BIA policy, will be acceptable to be placed into the NTTFI even though they will not currently be allowed in the mileage factor. Most tribes will need to update their Long Range Tribal Transportation Plan (LRTTP) and their Tribal Transportation Improvement Plan (TTIP) and any delay in establishing the uniform BIA policy may preclude tribes from receiving allowable funding in the future. Some examples of roads being allowed to be placed in the NTTFI might be roads that are

25 miles from the nearest corner of a tribal reservation that do not intersect a road with a higher classification, the road nearest the corner of a tribal reservation to the next highest classification of road, etc.

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. The Tribe recommends 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. Tribes may also consider requesting that paragraph (5), which addresses the development of environmental mitigation measures to protect Indian lands and the environment, be amended to include a reference to tribal cultural resources.

Section 170.102 sets forth the manner in which the Departments shall consult, collaborate, and coordinate with tribal governments. In light of the BIA and FHWA failure to provide written responses to tribal comments on proposed policy changes, the Tribe requests that this be revised to require that the Secretaries provide written responses to written tribal comments submitted in any consultation process, and that tribes have the opportunity to comment on the Secretaries responses. Where there are substantive disagreements between the agencies and the tribe, or between the tribes, the Susanville Indian Rancheria recommends that Section 170.102 provide that the Secretaries will seek a resolution in accordance with the goals and principles set forth in Section 170.103.

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 change would effectively shift the full maintenance burden for tribal transportation facilities and other non-BIA transportation facilities that present a threat to health, safety and economy onto the TTP funds. This significant restriction of the program is not supported by any statutory changes in MAP-21, and it is contrary to the Secretary's obligation, under 23 U.S.C. § 202(a)(8)(B), to ensure that TTP funding made available under Title 23 is supplementary to, and not in lieu of, any obligation of funds by the BIA for road maintenance programs. The Susanville Indian Rancheria, therefore, recommends that all four categories remain eligible for maintenance under the BIA Road Maintenance Program.

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. The Susanville Indian Rancheria, therefore, recommends 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, the Tribe recommends 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

The Susanville Indian Rancheria appreciates your consideration of these tribal comments and look forward to a written response to them. If the Departments proceed with a Notice of Proposed Rulemaking, the Tribe requests that you provide your written response prior to publishing the Notice of Proposed Rulemaking and that the Susanville Indian Rancheria be afforded the opportunity to respond to any comments with which the Department disagrees.

Sincerely,

Mr. Stacy Dixon
Tribal Chairman