



June 14, 2013

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

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

Tribal Consultations & Informational Meeting Comments  
U.S. Department of the Interior  
BIA Office of Indian Services  
Mail Stop 4513 MIB  
Washington, DC 20240

RE: Comments to the 25 CFR Part 170 Update

Dear Sirs:

The Pueblo of Laguna expresses its appreciation for the opportunity to present its comments in response to the Bureau of Indian Affairs (BIA) Federal Register Notice of April 12, 2013 (78 Fed. Reg. 21861), to the BIA and the Federal Highway Administration (FHWA).

We appreciate your consideration of the tribe's comments and 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 to the Pueblo 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.

Letter to LeRoy M. Gishi, Chief  
& Robert W. Sparrow, Jr., Director  
June 14, 2013  
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Should you have any questions, please contact the Director of the Department of Public Works at (505) 552-1218 or the Pueblo's Transportation Specialist at (505) 552-1229.

Sincerely,

**PUEBLO OF LAGUNA**



Jim Hooper, Jr.  
Chief of Operations

xc: Governor Richard Luarkie  
Lisa Lopez, BIA Laguna Agency Superint.  
Ray Lucero, Director-DPW, POL  
David Deutsawe, Transp. Specialist, POL  
subject file

25 CFR part 170 Update  
June 13, 2013  
Transportation Planning Program

General Comments:

- Who is responsible for managing and administering the law/rule that we are supposed to follow?
- How does the change affect those tribes with an approved LRTP under the old regulation? Does it make them void? Or can they continue on as needed.
- This is an inadequate timeframe to develop qualified changes!

Review exercise of 23 USC section 201 and 202 Federal Lands and Tribal Transportation Program.

1. Explain fiscal rule 201(b) and impact on old money and projects.
  - a. Explain how the provisions of Section 201(B) will impact funds distributed prior to MAP-21. How will this impact tribes that have to build up funds over several years to generate enough to construct a project?
  - b. How can the funds that are not unexpended after 3 years be returned to the tribe?
  - c. How do tribal shares that are prior year funds under BIA management transferred to a tribe that initiates a FHWA contract?
2. Inadequate time to comment, now on a fast track
  - a. The BIA and FHWA have not allowed sufficient time for tribal consultation on these complicated proposed regulations. There should be more tribal consultation on a local level.
  - b. Many tribes do not have the resources, including budget analysts, policy specialists, attorneys, and other technical expertise to properly assess this regulation. The BIA and FHWA should provide more detailed information and data to tribes that explain the impact of the proposed rule.
  - c.
3. 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. Tribes 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.
4. 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.
5. What is impact on approved LRTPs?
  - a. How are tribes with existing LRTPs impacted regarding funding, inventory, 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?
6. Clarify 201(c)(3) & (4) TTIP development and inclusion with state.
  - 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?
7. Clarify 201(c)(5) asset management
  - 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.
8. Clarify 201(c)(6) authorities and activities and connection to 638
  - a. MAP-21 section 201(c)(6) requires the Secretaries to collect and report data necessary to implement the tribal transportation program in accordance with ISDEA, 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.
9. Does 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 202(a)(10)(B)?
10. Clarify 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.
11. Rules for determining majority of AIAN residents.
  - a. Section 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.

12. Rule for dealing with undocumented ownership roads

- a. Tribes have inherited a road system from the BIA, states and counties that do not have documented road right-of-way for many of the roads. 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.

13. Rule for reporting roads built with Highway Trust Funds since 1983

- a. Tribes are responsible for updating the road inventory data. Section 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 within a specific timeframe upon tribal request. A report that identifies the roads qualifying under this provision should be provided to tribes.

14. 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 NTTTFI. The agencies should have included the criteria for adding or retaining a primary access route in the NTTTFI for tribal consideration and comment. Primary access routes should be limited to not exceed 15 miles in length. Primary access routes were defined in SAFETEA-LU and were the subject of TTPCC consideration and consensus deliberations for several years.

15. Clarify scope and limitations of 202(b)(2)

- a. MAP-21 Section 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 Section 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.

16. How do proposed bridges get funded?

- a. MAP-21 Section 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. The 2 percent bridge set-aside should be limited to use for BIA and Tribally owned bridges.

17. Clarify tribal PS&E approvals under direct FHWA agreements
  - a. Clarification is needed regarding 23 USC Section 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? The 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.
18. Clarify difference between 202(b)(6)(a)&(b) and 202(b)(7)(a)&(b)
  - a. Please provide clarification on the difference between 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.
19. Clarify 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.
20. Clarify 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?

21. Explain administration of 202 planning and 201 planning – TTIP approvals
- a. There are two seemingly conflicting and inconsistent transportation planning provisions for the Tribal Transportation Program in 23 USC Section 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 section 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 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. It appears that Congress mandated DOT and DOI to implement transportation planning which means primary responsibility for undertaking the planning activities is on the federal agencies and not on the tribes. 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.

22. How will 202(d)(3)(a) 20 ft opening be applied to culverts?
- a. 23 USC Section 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?
23. How will 202(f) be implemented and 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?

## **25 CFR part 170**

### **Pg. 25 Section 170.15**

- More support for TTPCC regional representatives to coordinate with tribes in the region
- Explain how TTPCC issues will be resolved and improved representation
- Create a mechanism to escalate issues for decisions
- (b) Operate by “simple” or “super” majority

### **Pg. 41 Section 170.226**

g. As used in (b) and (c) above “owned” means having authority to finance, build, operate, or maintain the facility.

- Revise “owned” definition
- Define “owned” as operated or maintained
- Clarify definition purpose and tribal impact
- Substitute “public authority” (citation 23 USC 101(a)(20))

### **Pg. 51 Section 170.443 – Proposed Facility Roads – TTPCC made recommendation in this section.**

- Tribes will need to decide whether to agree or disagree on these sections:(b) (3); (d); (e); (f)
- Have a policy on limiting road mileage in the National Inventory.
- Submitting to the Quality Assurance Team and they will determine what’s feasible.

### **Pg. 52 Section 170.444**

- (a)(1) Provide useable format of NTTFI data
- (2)(ii) Add formal BIA notification to tribes by certified letter
- Add statement about BIA notifying tribes by Nov. 1.

### **Pg. 53 Section 170.445**

- (c) Clarify facility data information

### **Pg. 53 Section 170.446**

- (g)(a) Explain requirement

### **Pg. 54 Section 170.451**

- Eliminate “limited” mitigation

### **Pg. 54 Section 170.454 & 170.470**

- Explain whether tribal proposed standards require BIA or FHWA approval

### **Pg. 56 Section 170.461**

- PSE – Explain if tribes meet regulations of 170.461 then do they submit plans to BIA per 170.460(d)



**Section 170-462**

- Explain why section was eliminated.
- Address timely payments of contract submittals by BIA contract offices
- Clarify policies and procedures for competitive bidding requirements

**Pg. 51 TTP Inventory**

- Include section on required inventory coding
- Provide tribes access to own tribal inventory data without security clearance
- Identify and streamline security clearance process for RIFDS



To: Honorable Bruce Tafoya,  
Governor, Santa Clara Pueblo

From: Ed Gonzales, P.E.  
SCP PW & Hwy Engineer

CC: Kathy Naranjo, Tribal Administrator

Reference: MAP-21, National Tribal Transportation Program Tribal Comments to 25 CFR 170: Questions and Comments regarding Title 23 USC draft regulations

The following are "Questions and Comments" compiled after review of information distributed to Tribes and SCP from the BIA, FHWA and subsequent discussions and meetings held on May 16, 2013 in Phoenix Arizona and June 10, 2013 in Albuquerque, NM by CSU TTAP in which I attended and participated.

Attached are specific Questions and Comments by various participants from SW Tribes including SCP, working cooperatively and reaching a consensus to develop a joint list of questions and comments that should be addressed under the draft regulations for MAP-21.

I recommend that these questions and comments be submitted to Mr. LeRoy Gishi, Chief, Division of Transportation, Bureau of Indian Affairs @ [Leroy.gishi@bia.gov](mailto:Leroy.gishi@bia.gov) and/or Robert W. Sparrow, Jr., Director Tribal Transportation Program, FHWA @ [Robert.sparrow@dot.gov](mailto:Robert.sparrow@dot.gov) on or before June 14, 2013.

Santa Clara Pueblo 25 CFR Part 170 Regulation Review

Questions and Comments Regarding Title 23 U.S.C.

June 12, 2013

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  - a. Explain how the provisions of Section 201(B) will impact funds distributed prior to MAP-21. How will this section impact tribes that have to build up funds over several years to generate enough to construct a project?
  - b. How can the funds that are not unexpended after 3 years be returned to the tribe?
  - c. How do tribal shares that are prior year funds, under BIA management, transferred to a tribe that initiates a FHWA contract? Explain the responsibilities and process to be followed.
2. The timeline does not provide adequate time to comment, especially for Tribes that have limited expertise and staff.
  - a. The BIA and FHWA have not allowed sufficient time for tribal consultation on these complicated proposed regulations. There should be more tribal consultation on a local level.
  - b. Many tribes do not have the resources, including budget analysts, policy specialists, attorneys, and other technical expertise to properly assess this regulation. The BIA and FHWA should provide more detailed information and data to tribes that explain the impact of the proposed rule.
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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. It appears that Congress mandated DOT and DOI to implement transportation planning which means primary responsibility for undertaking the planning activities is on the federal agencies and not on the tribes. 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.

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