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Via Electronic Mail Document Submission

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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 United South and Eastern Tribes, Inc. (USET)¹, the Reservation
Transportation Authority (RTA)², Kawerak, Inc.³, the Jamestown S'Klallam Tribe, the

¹ USET is a tribal consortium consisting of the following tribes: Alabama-Coushatta Tribe of Texas, Aroostook Band of Micmacs, Maine, Catawba Indian Nation, South Carolina, Cayuga Nation, New York, Chitimacha Tribe of Louisiana, Coushatta Tribe of Louisiana, Eastern Band of Cherokee Indians, North Carolina, Houlton Band of Maliseet Indians, Maine, Jena Band of Choctaw Indians, Louisiana, Mashantucket Pequot Tribal Nation, Connecticut, Mashpee Wampanoag Tribe, Massachusetts, Miccosukee Tribe of Indians of Florida, Mississippi Band of Choctaw Indians, Narragansett Indian Tribe, Rhode Island, Oneida Indian Nation, New York, Passamaquoddy Tribe—Indian Township, Maine, Passamaquoddy Tribe—Pleasant Point, Maine, Penobscot Indian Nation, Maine, Poarch Band of Creek Indians, Alabama, Saint Regis Mohawk Tribe, New York, Seminole Tribe of Florida, Seneca Nation of Indians, New York,

Suquamish Tribe, the Shoalwater Bay Indian Tribe, and the Cher-Ae Heights Indian Community of the Trinidad Rancheria, 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. 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) (collectively, "the Agencies") 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 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 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

Shinnecock Indian Nation, New York, The Mohegan Tribe, Connecticut, Tunica-Biloxi Tribe of Louisiana, and Wampanoag Tribe of Gay Head (Aquinnah), Massachusetts.

² The RTA is a 16-tribe transportation consortium consisting of the following tribes: Agua Caliente Band of Cahuilla Indians, Augustine Band of Cahuilla Mission Indians, Cahuilla Band of Mission Indians, Campo Band of Mission Indians, Capitan Grande Band of Mission Indians, Inaja and Cosmit Bands of Mission Indians, Jamul Indian Village, Los Coyotes Band of Cahuilla and Cupeño Indians, Mesa Grande Band of Mission Indians, Pauma and Yuima Band of Indians, Rincon Band of Luiseño Indians, San Pasqual Band of Diegueño Indians, Santa Rosa Band of Cahuilla Indians, Santa Ynez Band of Chumash Mission Indians, Torres-Martinez Desert Cahuilla Indians, and Viejas Band of Kumeyaay Indians.

³ Kawerak is a tribal consortium consisting of the following Alaska Native villages: Native Village of Brevig Mission, Chinik Eskimo Community, Inupiak Village of Council, Native Village of Diomedea, Native Village of Elim, Native Village of Gambell, King Island Native Community, Native Village of Koyuk, Native Village of Mary's Igloo, Nome Eskimo Community, Native Village of Savoonga, Native Village of Shaktolik, Native Village of Shishmaref, Native Village of Solomon, Native Village of St. Michael, Stebbins Community Association, Native Village of Teller, Native Village of Unalakleet and Native Village of Wales.

governmental function that impacts the health, safety and economic well-being of tribal communities and 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 the 13 regional meetings the BIA and FHWA held in 2012 as part of the Agencies' effort to seek tribal input on new policies to interpret only one aspect of the then existing regulatory formula governing the funding of proposed primary access roads.

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.

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.

Our clients are particularly concerned with the insufficient consultation given the scope of the revisions and the absence of compelling justification for such an expeditious process. While we understand that MAP-21 effectively overrides the existing Relative Need Distribution Formula (Part 170, Subpart C), 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. Rather, revision of the Part 170 process may be warranted based upon the 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 and programmatic changes that have evolved in practice as program authority and discretion have been transferred from the Agencies to the tribes. A regulatory revision of this nature, however, demands a more interactive process. For instance, following the SAFETEA-LU authorization, the Agencies engaged with tribes in a preliminary process to develop proposed revisions to Part 170 through working groups drafting and exchanging comments on proposed language.⁴

Furthermore, it must be acknowledged that MAP-21 was enacted for an unusually short authorization period in the face of severe shortfalls in the Federal Highway Trust Fund and other fiscal constraints. In light of these circumstances, two-year authorization period for MAP-21, we question the timeframes set forth by the Agencies. As scheduled, the new rule might be ready for implementation precisely at the moment when the statutory authorization governing it may undergo significant changes and demand revisions. If the federal government and the tribes are to devote limited transportation resources in rulemaking, we would perceive it may be better served by more thorough and deliberate manner with resolution in a time frame that could also accommodate statutory directives from the upcoming authorization.

We call on the Agencies to consider several guiding principles in advancing consultation on the revisions to the Part 170 regulations. First, we urge focused consultation and collaboration 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. Second, we suggest that the Agencies embrace and apply the policies and principles set forth in Part 170, Subparts A and B in this rulemaking process. In developing the NPRM, the Agencies must to assess whether the proposed revisions to each of the subsequent subparts of Part 170 achieve the objectives and comply with the directives set forth in Section 170.103 to the maximum extent permitted by law.

⁴ Although draft revisions were developed, the Departments never presented that collaborative draft for tribal consultation notice, nor proceeded with a Notice of Proposed Rulemaking (NPRM).

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 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.

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 tribes' 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).

- 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)). We recommend that the regulations expressly extend these ISDEAA references to FHWA Program Agreements.
- 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. 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, 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 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.

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 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.

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.

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.

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 of the Interior'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. We, therefore, recommend that all four categories remain eligible for maintenance under the BIA Road Maintenance Program.

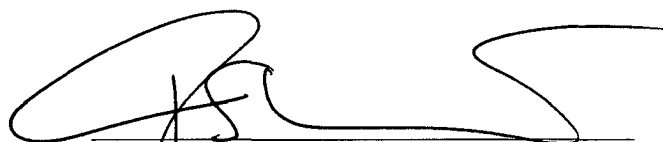
In addition, the draft revised regulations omit sections of the existing regulations that address the maintenance standards and the BIA's obligations to notify the Transportation Department and the owners of transportation facilities if it determines that an IRR transportation facility is not being properly 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 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 the right-of-way grant. 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 with which the Department disagrees.

Sincerely,

Hobbs, Straus, Dean, & Walker, LLP



Geoffrey D. Strommer
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cc: United South and Eastern Tribes, Inc.
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*NOT ADMITTED IN D.C.

June 14, 2013

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Re: Comments Regarding BIA and FHWA Draft Changes to 25 CFR Part 170
Federal Register Notice (78 Fed. Reg. 21861) April 12, 2013

Division Chief Gishi and Program Director Sparrow:

Thank you for affording us the opportunity to provide comments and recommendations concerning the draft changes to the Part 170 regulations for the Tribal Transportation Program proposed by the Bureau of Indian Affairs (BIA) and Federal Highway Administration (FHWA). We offer our comments on behalf of the following Indian tribes: Assiniboine and Sioux Tribes of the Fort Peck Reservation, Chickaloon Village Traditional Council, Eastern Shoshone Tribe, Egegik Village Tribal Council, Healy Lake Traditional Council, King Island Native Community, Oglala Sioux Nation of the Pine Ridge Reservation, the Shoshone-Bannock Tribes of the Fort Hall Reservation, the Shoshone-Paiute Tribes of the Duck Valley Reservation, Sleetmute Traditional Council, and the Standing Rock Sioux Tribe.

We have divided our comments into two parts. In Part I, we provide general observations concerning the proposed revisions. In Part II, we provide detailed recommendations regarding

particular regulatory provisions. Where appropriate, we have included rationale statements (highlighted in red) to support the suggested change.

I. OVERVIEW

For the most part, BIA and FHWA propose non-controversial changes to the Part 170 regulations intended to reflect the statutory changes mandated by SAFETEA-LU and MAP-21. This includes changing references to the “Indian Reservation Roads Program” to the “Tribal Transportation Program.” Yet in important instances, the draft revisions deviate from the statutory requirements and the regulatory goals and principles that have guided the Interior Department since the Part 170 regulations were first implemented in 2004. Many of these proposed changes 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 Tribal Transportation Program, preclude tribal access to the BIA’s PM&O and PRAE funds and deny tribes the right to challenge and appeal important agency determinations concerning funding allocations or decisions by the BIA concerning tribal updates of facilities that may be included in the National Tribal Transportation Facility Inventory (NTTFI).

On May 15, 2013, Interior Secretary Sally Jewell testified before the Senate Committee on Indian Affairs. She stated:

As Secretary of the Interior, I am committed to upholding the Federal government's obligations to Native Americans and to strengthening the United States' government-to-government relationship with Indian tribes and Alaska Natives.

As Secretary, I intend to carry on the Obama Administration’s policy with respect to Indian Affairs. The cornerstone of that policy continues to be promoting tribal self-governance and self-determination and recognizing the inherent right of tribal governments to make their own decisions to strengthen their communities.

We encourage the agencies to embrace Secretary Jewell’s remarks by revising the Part 170 regulations to authorize and promote tribal innovation and efficiency in the administration of the Tribal Transportation Program. Given the lack of funding increases in MAP-21, this rulemaking provides an important opportunity to the BIA to make changes that will further streamline the Tribal Transportation Program to empower Indian tribes to expend their limited federal funds in a more efficient, cost-effective and productive manner. We urge BIA and FHWA to build on the original Part 170 regulations and further streamline the regulations to promote best practices by BIA, FHWA and the tribal governments in the administration of the TTP.

To accomplish the shared tribal and federal goals of improving the TTP, the agencies must:

- agree to meaningful tribal consultation before issuing a Notice of Proposed Rulemaking for the Part 170 regulations (the draft changes made by BIA and FHWA were presented to TTP Coordinating Committee for comment; tribes were not consulted by the agencies

concerning whether additional provisions warranted changes to improve the program; no redline edition was posted online or distributed to tribes during consultation meetings so tribes could *easily* track the draft changes, understand them and provide recommendations to improve the suggested changes; and recent efforts by the tribal caucus to the TTP Coordinating Committee to meet directly with the BIA Assistant Secretary and FHWA Associate Administrator have not been successful);

- undertake a serious and thoughtful examination of the Part 170 regulations and the mechanics of how FHWA and BIA interact to oversee the TTP and how BIA can better design and overhaul its internal operations and procedures to provide prompt transfer of TTP funds, technical assistance and, when required, direct transportation services to Indian tribes in light of the serious budget and personnel reductions facing the Interior Department; and
- interpret Federal laws and regulations to “facilitate” and “promote” the right of tribal governments to directly operate tribal transportation programs, encourage flexibility and innovation, reduce, streamline and eliminate unnecessarily restrictive transportation policies, guidelines or procedures, implement the TTP consistent with tribal sovereignty and the government-to-government relationship, ensure the continuation of the trust responsibility (25 CFR §§170.2(e) and 170.103(c), (d), (f), (g) and (i)) and “liberally construe” laws and regulations for the benefit of Indian tribes to “implement the Federal policy of self-determination and self-governance.” 25 CFR 170.2(h).

In addition to the specific regulatory changes we set out in Part II below, we urge the BIA and FHWA to reconsider and reverse the following changes proposed to the draft Part 170 regulation which are inconsistent with the Secretaries’ obligations to Indian tribes and the proper administration of this important program:

1. Authorize Formula Data and Related Appeals (Subpart C, § 170.231) – We object to the rewrite of 170.231 that precludes appeals by tribes of the data relied upon by the BIA to calculate “tribal shares” under the Tribal Transportation Program. The BIA may make mathematical or transcription errors when using any of the relevant data, including the “historic” RNDF and PAF data, “eligible road mileage,” NAHASDA AIAN population figures, the seven-year average of RNDF/PAF funding, or tribal shares of Tribal Supplemental Allocation funds.

We urge the agencies to amend the Part 170 regulations to permit Indian tribes to bring administrative challenges and appeals against the BIA concerning disputes over “tribal shares” calculations, while still ensuring that the majority of appropriated TTP funds are distributed to tribes and BIA Regions. Tribes should also be permitted to appeal agency denials concerning a tribe’s addition of “Tribal Transportation Facilities” that are not currently listed on the NTTFI, or disputes which arise from tribal updates to their TIP; all preconditions to the allowable use of TTP funds by a tribe of TTP for an eligible TTP project. See Part II.15 and 19 below.

2. Promote the Prompt transfer of Federal-aid and State Highway Safety Improvement Program funds to Indian tribes – We are pleased to see that draft section 170.926 is revised to allow tribes to administer approved Emergency Relief for Federally Owned (ERFO) Roads

repair projects and activities under a self-determination contract, agreement, FHWA Program agreement and “other appropriate agreements” (e.g., Interior’s Government-to-Government Agreements). The draft changes, however, do not authorize tribes to receive Chapter 1 Federal-Aid funds, or State-administered highway safety funds under Chapter 4, using existing award instruments with the BIA and FHWA, thereby complicating the prompt transfer and use by tribes of Federal-Aid and Highway Safety funds.

Allowing Indian tribes to use a single award instrument to receive transportation and safety funds is one of the most effective measures the federal agencies can take to improve Tribal transportation infrastructure and safety on tribal lands. MAP-21 requires FHWA to promote the cooperation of States and counties in the construction and improvement of eligible tribal transportation projects and requires “any funds” received from a State or county or local subdivision to be “credited to appropriations available for the tribal transportation program.” 23 U.S.C. §202(a)(9). In fact, BIA Government-to-Government (G2G) Tribal Transportation Program Agreements wisely and expressly acknowledge that Tribes may receive Federal-Aid funds under the G2G Agreements, but the FHWA so far has not followed suit.

We urge the agencies to amend Subpart E (Service Delivery) and other relevant sections of the Part 170 regulations to authorize the direct transfer of Chapter 1 Federal-Aid and Chapter 4 State-administered Highway Safety funds to tribes using available TTP award instruments. We attach a short memorandum dated February 4, 2013 further explaining the TTP program benefits and legal underpinnings for this recommendation. See Part II.9 and 25 below.

3. Do Not Shield BIA’s Program, Management and Oversight (PM&O) and Project-Related Administrative Expenses (PRAE) – As defined in draft provisions 170.5 (Definition of “TTP program management and oversight funds”) and as provided in draft sections 170.612-613 (determination of “non-contractible, non-project related functions”), the BIA seeks to shield from transfer to an Indian tribe any portion of its PM&O and PRAE allocation by asserting that all such funds are used for “non-contractible” inherent federal functions. That is factually and legally incorrect, and contrary to 23 U.S.C. 202(b)(7)(E) and FHWA’s practice for the last seven years in contracting with tribes to carrying out the TTP under an FHWA Program Agreement.

Amend 170.5 and 170.612 and 170.613 to reflect the ability of FHWA to negotiate with BIA, and share with tribes, a portion of the BIA’s PM&O and PRAE funds when tribes assume the Secretary of the Interior’s duties for the TTP under an FHWA TTP Agreement.

4. Oppose the Unlawful Restricted Use of BIA Road Maintenance Program funds to BIA Road System facilities only - Contrary to existing federal law (25 U.S.C. 318a and 23 U.S.C. 202(a)(8)(B)) and regulations (25 C.F.R. 170.803), and undermining the Administration’s Making Communities Safer initiative, the BIA’s draft changes to the Subpart G (Maintenance) regulations would restrict the use of BIA Road Maintenance Program funds for only BIA Road System facilities (roads and bridges), and exclude Tribally-owned roads and bridges. Since 2004, the Part 170 regulations have recognized and sanctioned the ability of Indian tribes to use BIA Road Maintenance Program funds for BIA, tribal, and, at the tribe’s election when required to “ensure public health, safety and economy,” non-BIA System, non-tribally-owned

transportation facilities, provided that the tribe has an agreement in place with the public authority that owns the facility.

As drafted, the revised Part 170 regulations would undermine federal law and regulations as well as Indian Self-Determination and Education Assistance Act (ISDEAA) contracts that Indian tribes have in place with the BIA that permit Indian tribes to maintain BIA System, Tribally-owned transportation facilities, and as noted above, non-BIA, non-Tribally owned facilities important to the public health, safety and economy of the tribe.

5. Oppose the Improper Application of 25 CFR Part 169 (Rights-of-Way) to Tribal Administration of the TTP – Sections 170.460(b)(2) and 170.473(d) of the draft regulation would, if implemented, raise uncertainty in the TTP by requiring that a PS&E package must include “certification of the required right-of-way, easement, or public taking documentation clearances,” and raise an issue of whether the Part 169 (Right-of-Way) regulations apply to TTP projects that are carried out by Indian tribes, including the requirement to secure an affidavit of completion of a ROW to file and record with the BIA under 25 CFR 169.16, in order to properly register a ROW over Indian lands.

Tribes successfully fought to exclude references to the Part 169 regulations during the Part 170 Negotiated Rulemaking sessions in the late 1990s and early 2000s. Tribes were successful then because the “tribal and Federal sides agreed . . . that relying on 25 CFR Part 169 as the only reference for rights-of-way over Indian lands was not appropriate since tribes are not required to obtain rights-of-way when constructing IRRs across their own reservation” (see 69 Fed. Reg. 43090, 43092, July 19, 2004). During the Negotiated Rulemaking it was the Federal view that “any issues beyond the scope of the existing 25 CFR 169 are properly dealt with in a future revision of part 169 and are inappropriate for inclusion in this rule or for public comment.” See 67 Fed. Reg. 51341, August 7, 2002 (Part 170 NPRM). The draft regulations for the IRR Program first published by the BIA on August 7, 2002 (67 Fed. Reg. 51328 et seq.) addressed the disagreement then between Indian tribes and the BIA concerning rights-of-way.

The Part 170 regulations should retain the consensus “right-of-way clearances” phrase in current section 170.460(b)(2) and further streamline and simplify the right-of-way acquisition phase in the development of an eligible TTP project. The BIA must also vastly improve the time it currently takes to process Tribal requests for road and bridge right-of-way documents and could use this regulatory updating process to eliminate unnecessary barriers to the prompt and accurate processing of right-of-way documents.

We also urge the agencies to revise the Part 170 regulations, in consultation with tribes, to provide “corridor management” provisions to avoid the erosion of Tribal jurisdiction under the Supreme Court’s 1997 Strate v. A-1 Contractors decision (520 U.S. 438 (1997)), and streamline the development of transportation infrastructure in Indian country. Organizations such as the Center for Urban Transportation Research have written on the subject of corridor development and management. See Managing Corridor Development A Municipal Handbook, CUTR October 1996. <http://www.cutr.usf.edu/pdf/corridor.pdf>. The Part 170 regulations include a number of provisions “for information only.” We encourage the agencies to develop corridor management provisions in a revised Part 170 regulation.

6. Omission of other SAFETEA-LU and MAP-21 provisions – The draft revisions to the Part 170 regulations do not address, but should:

- SAFETEA-LU’s and MAP-21’s 30-day payment rule - SAFETEA-LU requires the BIA to distribute TTP shares to tribes “not later than 30 days after the date on which funds are made available to the Secretary of the Interior” (23 U.S.C. §202(b)(4)(A)). The provision is not referenced in the revised rule and must be to ensure that the BIA comes into compliance with this important legal requirement (see, e.g., draft section 25 C.F.R. §170.203 as a suitable provision to include a reference to 23 U.S.C. §202(b)(4)(A)).

Amend the Part 170 regulations to reference this seven year old statutory requirement to expedite the BIA’s distribution of TTP funds to tribes.

- Reference the use of Categorical exclusions under MAP-21 to expedite project approvals – The revised rule should cross reference the directive to the Secretary of Transportation under MAP-21 to designate any project that is within an “existing operational right-of-way,” or that receives less than \$5 million in Federal funds, or that concerns qualifying projects for the repair or reconstruction of a road, highway, or bridge in operation or under construction and damaged by an emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as actions categorically excluded from the requirements relating to environmental assessments or environmental impact statements. See sections 1316 and 1317 of MAP-21 (126 Stat. 549 et seq.).

Most TTP-funded projects will likely qualify for a categorical exclusion under the above-noted MAP-21 provisions, yet these streamlining provisions are not reflected in the draft regulation. As we note below in Part II.23, the BIA can include such provisions “for information only” and without changing other federal agency’s regulations concerning the topic.

- The ability to expand the type and character of transportation facilities eligible for listing on the National Tribal Transportation Inventory – Tribes have fought for years to ensure that public transit facilities, ice and board roads, marine facilities and other transportation facilities could be included in the Inventory, if only to ensure that IRR/TTP funds could be expended on such facilities as an allowable cost. Consensus motions were passed by the TTP Coordinating Committee concerning these issues. Draft section 170.226 omits MAP-21 statutory text that permits the inclusion in the NTTFI of “additional transportation facilities” if such facilities are included in the inventory in a “uniform and consistent manner nationally.” See 23 U.S.C. § 202(b)(1)(D).

Expressly reference MAP-21’s catchall “additional transportation facilities” language in the Part 170 rule as we propose below in Part II.1(f), 4 and 13.

- Eligibility for Additional Funds – In draft section 170.602(b), we object to the notion that only Indian tribes carrying out contractible transportation programs and functions under a Pub. L. 93-683 contract or self-governance agreement may request additional funding from the Secretary due to unforeseen circumstances, when all other agreements (FHWA and BIA G2G Agreements) include “limitation of cost” clauses and provisions

that clearly allow tribes to seek additional transportation funding from the Secretary “on the same basis as other Indian tribes.”

Revise 170.602(b) to clarify the right of every Indian tribe to request additional funding from the Secretary regardless of the type of award instrument or from which federal agency the tribe elects to assume the Secretary of the Interior’s duties for the TTP.

7. Additional Draft Regulation Changes we object to –

- Inconsistent reference to FHWA in numerous provisions of the Part 170 regulations. Since 2006, tribes have had the ability to contract directly with FHWA and today more than 100 Indian tribes have assumed the Secretary’s duties for the TTP under an FHWA Program Agreement.

The Part 170 regulations should consistently reflect FHWA’s role as an awarding and oversight agency that interfaces directly with Indian tribes and not solely as a funding agency for TTP and other transportation funds. The draft changes are inconsistent in revising the Part 170 regulations to reflect FHWA’s active participation in the TTP.

- the rewrite of Subpart G’s (Maintenance) section 170.803 (eligible uses of BIA Road Maintenance Program funds) and the deletion of sections 170.807 (addressing the importance of the TTP Transportation Facilities Maintenance Management System to identify future transportation facility maintenance needs through such means as predicting facility deterioration, tracking and reporting actual maintenance costs and activities, forecasting short- and long-term budget needs, etc.) and 170.810 (the role the TTPCC should play with BIA to develop such Management Systems).

The requirement for the agencies and Indian tribes to develop asset management practices is greatly undermined by the agencies’ unilateral and unwise decision to strike existing text from Subpart G of the Part 170 regulations.

- Definition of “Construction contract” (170.5) – The BIA attempts to fold road maintenance projects within the definition of “Construction contract” in the draft regulation section 170.5. Road maintenance is not a construction activity under Pub. L. 93-638.

MAP-21 defines the term “Construction” and the BIA’s effort to expand the term does not streamline the Program.

8. Cost-to-Construct Tables – The draft rule retains the Part 170 regulation Cost-to-Construct (CTC) tables. MAP-21’s formula does not require current CTC calculations but we agree that this information is beneficial to BIA and Tribal transportation professionals. However, retaining the CTC tables alone, without explanation of their use or purpose is insufficient. The BIA should provide an explanation in the Part 170 regulations concerning why the CTC tables remain and how Indian tribes and BIA Regional Offices should use the tables to the benefit the TTP and Indian tribes.

II. SPECIFIC RECOMMENDATIONS

We set out below are our specific recommendations concerning the BIA/FHWA April 12, 2013 draft changes to the Part 170 regulations.

SUBPART A – Policies, Applicability, and Definitions

1. Sec. 170.5 Definitions

- a) Asset Management – Amend the definition section to add a new definition as follows:

Asset Management means a strategic and systematic process of operating, maintaining, and improving physical assets, with a focus on both engineering and economic analysis based upon quality information, to identify a structured sequence of maintenance, preservation, repair, rehabilitation, and replacement actions that will achieve and sustain a desired state of good repair over the lifecycle of the assets at minimum practicable cost.

Asset Management is a defined term in MAP-21. The definition and the concepts behind the definition should be integrated into the TTP program given the shortage of TTP and BIA Road Maintenance Program funds now available to Indian tribes and the BIA. Section 201(c)(5) of MAP-21 reaffirms the obligation of the Secretary of Transportation, and the Secretary of each appropriate Federal land management agency, to implement safety, bridge, pavement and congestion management systems for facilities funded under the tribal transportation program in support of asset management. We urge the agencies to add this term and retain existing Subpart G (Maintenance) regulatory provisions that address transportation facilities maintenance management system planning and forecasting.

- b) “BIA Road System” – Amend the definition of BIA Road System” to read:

“BIA Road System means the Bureau of Indian Affairs Road System under the National Tribal Transportation Facility Inventory (NTTFI) and includes only those existing and proposed facilities for which the BIA has or plans to obtain legal right-of-way and Tribal Road System facilities. For the purposes of fund distribution as defined in 23 U.S.C. 202(b), the BIA Road System and Tribal Road System includes only those existing and proposed facilities that are approved and included in the NTTFI as of fiscal year 2012.”

As required by law (25 U.S.C. 318a and 23 U.S.C. 202(b)), BIA Road System facilities and Tribal Road System facilities (tribally-owned) should be treated the same. Since its enactment in 1928, 25 U.S.C. 318a has required the appropriation of federal funds for the improvement, construction “and maintenance of Indian reservation roads not eligible [for] Government aid under the Federal Highway Act and for which no other appropriation is available.” Without BIA Road Maintenance Program funds, tribally-owned roads and bridges will deteriorate rapidly, the level of service will decline and tribal families and other motorists will be at increased risk of serious injury or death due to the lack of federal funds for routine and emergency maintenance.

Common sense requires that this restrictive language be stricken from the draft changes to Part 170 regulations. See our additional discussion in Part II.28 below.

- c) “Construction contract” – Amend the definition as follows:

Construction contract means a fixed price or cost reimbursement self-determination contract, FHWA Program Agreement, BIA Government-to-Government Agreements or other appropriate agreement for a construction project or program ~~or eligible TTP funded road maintenance project~~, except that such term does not include any contract”

As proposed, the definition of “Construction contract” does not acknowledge the right of Indian tribes to carry out the Secretary of the Interior’s duties for the TTP under FHWA Program Agreements or other appropriate agreements (e.g., DOI Government-to-Government Agreements), both of which are not P.L. 93-638 contracts. As noted above, road maintenance projects are not construction projects.

- d) “Consultation” – Amend the definition as follows:

Consultation means government-to-government communication in a timely manner by all parties about a proposed or contemplated decision or policy in order to:

- (1) Secure meaningful tribal input and involvement in the decision-making process to inform the final decision or policy; and
- (2) Advise the tribe(s) of the final decision or policy and provide an explanation.

The suggested edits to the term “consultation” are in keeping with the Administration’s policy concerning tribal consultation reflected in President Obama’s Memorandum to Executive Agencies of November 5, 2009, and the Interior Department’s tribal consultation policy.

- e) “Maintenance” – Amend the definition of the term “Maintenance” to strike the reference to “23 U.S.C. 202.” “Maintenance” is a defined term at 23 U.S.C. 101(13), as amended by MAP-21.

We further recommend that the definition section to the Part 170 regulations add the term “Preventive Maintenance” and define it as in 23 U.S.C. 101 as follows:

Preventive Maintenance includes pavement preservation programs and activities which are programs and activities employing a network level, long term strategy that enhances pavement performance by using an integrated, cost-effective set of practices that extend pavement live, improve safety and met road user expectations.

- f) “National Tribal Transportation Facility Inventory” – Amend the definition as follows:

Strike the word “or” after paragraph (6), the period after (7) and add the following

new subsection:

“; or (8) additional transportation facilities that are eligible for funding under the tribal transportation program in the inventory used for the national funding allocation if such additional facilities are included in the inventory in a uniform and consistent manner nationally.”

And amend the final sentence of the definition as follows:

“As used in ~~(b) and (c)~~ (2) and (3) above, ‘owned’ means having the authority to finance, build, operate, or maintain the facility. See 23 U.S.C. 101(a)(20).”

As stated in Part I.6 above, the regulations should include MAP-21’s “catch all” provision that authorizes the inclusion in the NTTFI of additional transportation facilities that are included in a “uniform and consistent manner nationally.” While the inclusion of such routes will not alter the BIA’s calculation of “eligible road mileage” under MAP-21’s funding formula for the TTP for FY 2013 and FY 2014, it will ensure that an Indian tribe can expend TTP funds on the project.

- g) Tribal Road System – Amend the definition of the term Tribal Road System to correct a typographical error (substitute the word “that” for the word “for” in the phrase “... proposed facilities ~~for~~ that are approved and included in the NTTFI as of fiscal year 2012.”
- h) “TTP program management and oversight funds” – Amend the definition as follows:

“**TTP program management and oversight and project-related administrative expense funds** mean those funds authorized by 23 U.S.C. 202(a)(6) to pay the cost of carrying out ~~inherently Federal~~ program management and oversight (PM&O) and project-related administrative expenses ~~activities~~ (PM&O).

Without the proposed change, the BIA would effectively shield PM&O and PRAE funds from being shared with Indian tribes as has been FHWA’s practice from 2006 – 2013. It is legally and factually incorrect for the BIA to characterize all PM&O and PRAE funds as required for “inherently Federal” functions. 23 U.S.C. §202(b)(7)(E) provides otherwise. With passage of SAFETEA-LU, FHWA negotiated a share of the BIA’s 6% PM&O and PRAE funds for its own use, in overseeing the IRR Program. FHWA also shared with tribes a portion of the PM&O and PRAE funds that it negotiated with BIA and included in the FHWA Program Agreements it executed with tribes. The tribe’s share was reflected in the RFA document. MAP-21 continues this requirement.

MAP-21 does not characterize PM&O and PRAE funds as required solely for Inherent Federal Functions and provides that “not more than 6 percent” may be used by the Secretary or the Secretary of the Interior for PM&O and PRAE expenses. 23 U.S.C. 202(b)(7)(E) directs FHWA to award an Indian tribe its TTP shares and “such additional amounts as the Secretary [USDOT] determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project.” It is an unlawful overreach by the

BIA to characterize all PM&O and PRAE funds as required for inherent federal functions which it cannot transfer to an Indian tribe. This section must be revised to ensure that the proposed regulatory changes comply with section 202(b)(7)(E), as amended by MAP-21.

SUBPART B – Tribal Transportation Program Policy and Eligibility

Consultation, Collaboration, Coordination

2. Sec. 170.100 – What do the terms “consultation, collaboration, and coordination” mean?

See comments regarding definition of “Consultation” in 1.c) above.

3. Sec. 170.102 – How do the Departments consult, collaborate, and coordinate with tribal governments?

Amend the answer to Sec. 170.102 by adding the following phrase at the end:
The Department of the Interior and the Department of Transportation operate within a government-to-government relationship with federally recognized tribes. As a critical element of this relationship, these agencies should assess the impact of Federal transportation policies, plans, projects, and programs on tribal rights and interests to ensure that these rights and concerns are appropriately considered before the Secretaries finalize agency policies, plans, projects and programs.

Eligible Uses of TTP Funds

4. Sec. 170.115 – What activities may be carried out using TTP funds?

Amend 170.115(a) and (b) to read as follows:

(a) TTP funds may be used:

- (1) For any activity that is eligible for Federal funding under any provision of title 23 U.S.C.;
- (2) For all of the items listed in Appendix A to this subpart;
- (3) For other purposes identified in this part; or
- (4) For other purposes proposed by a tribe or the TTP Coordinating Committee and approved by FHWA and BIA pursuant to 170.117 and 170.156.

(b) Each of the items listed in paragraph (a) Appendix A must be interpreted in a manner that permits, rather than prohibits, a proposed use of funds.

Draft Sec. 170.115 and Appendix A to Subpart B should expressly reference the eligible activities listed in 23 U.S.C. 202(a), as amended by MAP-21. The catch-all phrase of 170.115(a)(1) “For any activity that is eligible for Federal funding under any provision of title 23 U.S.C.” is taken from draft section 170.137(c) of the Part 170 regulation (What types of activities can a recreation, tourism, and trails program include?). We think the mandates of

MAP-21 as well as existing Part 170 regulatory provisions should extend section 170.173(c)'s mandate to all provisions of title 23 to broadly define eligible TTP activities. Our above recommendation is also required if the BIA and FHWA are to authorize the transfer of other title 23 program funds to an Indian tribe using available award instruments for the TTP.

5. Sec. 170.116 – What activities are not eligible for TTP funding?

Amend 170.116(e) to read:

- (e) Purchase of construction and maintenance equipment unless approved by BIA and FHWA as authorized under Appendix A to Subpart B this part; or

The Part 170 regulations should, where appropriate and helpful, cross reference other regulatory provisions within Part 170 to help Indian tribes, BIA and FHWA administer the TTP in a more uniform and consistent manner. Appendix A to Subpart B – Allowable Uses of TTP Funds, B.49, expressly recognizes the purchase, lease or rental of construction equipment as an allowable use of TTP funds when an equipment purchase request is accompanied by a written cost analysis and is submitted to and approved by FHWA. In fact, FHWA and BIA G2G Agreements expressly authorize the purchase of construction and maintenance equipment when an appropriate cost analysis is provided. For nearly all Tribes carrying out TTP activities over many years, it is far less expensive to purchase equipment than it is lease this equipment for long periods of time. Therefore, we believe that Section 170.116(e) is misleading as written.

At a minimum, 170.116(e) should reference the authority found in Appendix A to Subpart B to make purchase of construction and maintenance equipment an allowable expenditure of TTP funds, but we also believe this section would be far better worded as an affirmative statement that such purchases are allowable with the appropriate cost analysis information provided to the BIA or FHWA.

6. Sec. 170.117 – How can a tribe determine whether a new use of funds is allowable?

Amend 170.117 to add a new paragraph (d) which reads:

- (d) When BIA or FHWA determine an issue of eligibility concerning the use of TTP funds that is requested by an Indian tribe, the agencies shall promptly make the final determination available to the TTP Coordinating Committee and make its decision publicly available on agency websites.

The agencies should encourage uniform practices by providing the TTP Coordinating Committee with determinations of allowable uses of TTP funds and posting this information on their websites.

Use of TTP and Cultural Access Roads

7. Sec. 170.120 – What restrictions apply to the use of a Tribal Transportation Facility?

Amend 170.120(a) as follows to allow the public authority or the Secretary of the Interior to restrict road use or temporarily close a public road when:

(a) Required for public health and safety, including but not limited to tribal or Federal law enforcement, fire prevention or suppression, natural disasters, fish or game protection, low load capacity bridges, prevention of damage to unstable roadbeds, or as provided in §§ 170.122 and 170.813 or for other reasons deemed to be in the public interest as approved by the Secretary;

The draft 170 rewrite consolidates Sec. 170.120 with existing Part 170 section 170.813 (When can access to IRR transportation facilities be restricted?). In the draft Part 170 regulations, BIA strikes section 170.813. The addition of the phrase “or for other reasons deemed to be in the public interest as approved by the Secretary” is taken from 170.813(a)(5) and should be retained in the draft regulation section 170.120 to emphasize the non-exclusive nature of when access to a public road may be restricted by the public authority or the Secretary of the Interior.

Recreation, Tourism and Trails

8. Sec. 170.136 – How can a tribe obtain funds [for its recreation, tourism, and trails program]?

Amend 170.136(b) to add a new subsection (3) to read:

(3) For projects that are otherwise contractible under title 23, the State may return the funds to FHWA and have them transferred to the tribe under an Agreement.

Throughout the draft regulations, and not just this section, BIA and FHWA have omitted text that memorializes the ability of Indian tribes to contract the Secretary of the Interior’s duties for the TTP directly from FHWA under a TTP Agreement, which has been the law since SAFETEA-LU was enacted in August 2005.

The Part 170 regulations should be amended to authorize that “any funds received from a State, county, or local subdivision shall be credited to appropriations available for the tribal transportation program” as provided in 23 U.S.C. 202(a)(9), as amended by MAP-21, Pub. L. 112-141, 126 Stat. 478, 23 U.S.C. 104(f) (transfer of highway and transit funds), 23 U.S.C. 202(a)(2)(B), and other authorities.

Highway Safety Functions

9. Sec. 170.141 - What funds are available for a tribe's highway safety activities?

Amend Sec. 170.141 as follows:

- (a) Funds are made available for a tribe's highway safety activities through a TTP set-aside established in 23 USC 202(e). The funds are to be allocated based on an identification and analysis of highway safety issue and opportunities on tribal lands. Tribes may also use their TTP funds made available through 23 USC 202(b) for highway safety activities as well as seek grant and program funding from appropriate state and local agencies and private grant organizations.
- (b) In addition, the following programs may make funds available to tribes for safety projects and activities:
- (i) FHWA Highway Safety Improvement Program (HSIP) 23 USC 148;
 - (ii) Elimination of Hazards Relating to Railway Highway Crossings (23 USC 130, 23 CFR 924);
 - (iii) State and Community Highway Safety Grant Program;
 - (iv) State Traffic Safety Information System Improvement Grants Program;
 - (v) NHTSA – Alcohol-Impaired Driving Countermeasures Incentive Program;
 - (vi) NHTSA – Occupant Protection Incentive Grant Program;
 - (vii) NHTSA – Child Safety and Child Booster Seat Incentive Program; and
 - (viii) BIA – Indian Highway Safety Program 25 CFR 181;
 - (ix) Funding for highway safety activities from the U.S. Department of Health and Human Services (HHS); and
 - (x) Other funding that Congress may authorize and appropriate.
- (c) Any funds received from a State, county, or local subdivision shall be credited to appropriations available for the tribal transportation program. For any State-administered safety programs identified in paragraph (b) that Indian tribes cannot apply for directly to the Secretary of Transportation, upon the request of an Indian tribe, the State may return the funds in question to FHWA and have them transferred to BIA and made available for tribal self-determination contracts, self-governance agreements, BIA Government to Government Agreements, or awarded by FHWA directly to the Indian tribe under a TTP Program Agreement.
- (d) A project that utilizes TTP funds made available under 23 USC 202(b) or TTP set-aside funding established in 23 USC 202(e) must be identified on a FHWA- approved TTPTIP prior to any funds being expended.

Data from Indian country regarding highway fatalities and serious injury are included in State Departments of Transportation and State Departments of Public Safety reports submitted to NHTSA and FHWA. State DOTs, in turn, receive HSIP and other title 23 United States Code safety funds, in part, based on submitted crash data to address highway safety needs within the

State, including safety needs in Indian country. All too often, however, Indian tribes do not receive their “share” of State-administered federally appropriated highway safety funds. MAP-21 also imposes obligations on States to include tribal safety data in their State highway safety plans.

New subparagraph (c) above is meant to expedite and streamline the award of federal highway safety funds to Indian tribes as required under MAP-21 (23 U.S.C. §202(a)(9)) which provides that the cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement projects and “any funds received from a State, county, or local subdivision shall be credited to appropriations available for the tribal transportation program. Paragraph (c) is also consistent with existing Part 170 regulations (see 25 C.F.R. 170.103(c)) (to promote the rights of tribal governments to receive direct transportation services from the Federal Government), 170.103(f) (to encourage flexibility and innovation in the implementation of the [TTP]), 170.103(g) (to reduce, streamline and eliminate unnecessarily restrictive transportation policies, guidelines, or procedures), 170.103(h) (to ensure that tribal rights and interests are appropriately considered during program development), and 170.103(i) (to ensure that the [TTP] is implemented consistent with tribal sovereignty and the government-to-government relationship)).

10. Sec. 170.144 – How can tribes obtain non-TTP funds to perform highway safety projects?

Amend the section to read:

There are a number of two methods to obtain National Highway Traffic Safety Administration (NHTSA) and other, non-TTP, FHWA safety funds for highway safety projects:

- (a) FHWA provides safety funds to BIA under 23 U.S.C. 402. BIA annually solicits proposals from tribes for the use of these funds. Proposals are processed under 25 CFR Part 181. Tribes may request an ISDEAA contract or agreement or other appropriate agreement for these projects.
- (b) FHWA provides funds to States under 23 U.S.C. 402 and 405. States annually solicit proposals from tribes and local governments. Tribes seeking to obtain funding from the states under these programs should contact the state directly to determine eligibility, contracting opportunities, and project administration requirements. Tribes may request:
 - (1) To administer these programs under the State’s locally administered project program; or
 - (2) That for projects that are otherwise contractible under Public Law 93-638 (25 U.S.C. 450 et seq.), or which may be carried out by an tribe under an Agreement with FHWA, that the State return the funds to FHWA and have them transferred to BIA for tribal self-determination contracts or self-governance agreements under ISDEAA, BIA Government-to-Government

Program Agreements, or other appropriate agreement, or for FHWA to include the funds in a TTP Agreement. Any funds received from a State, county, or local subdivision shall be credited to appropriations available for the tribal transportation program.

As explained above and consistent with statutory authority available to the FHWA and the BIA under title 23 (202(a)(9)), the FHWA and BIA may transfer State HSIP and chapter 4 title 23 NHTSA safety funds into a TTP Agreement or BIA G2G Agreement. The proposed changes above implement 23 U.S.C. § 202(a)(9) and honor the government-to-government relationship between the United States and Indian tribes and, equally important, encourages flexibility and innovation in the implementation of the TTP. Consistent with President Obama's executive orders and repeated promises to Tribal leaders during his annual meetings with them, the proposed changes will reduce, streamline and eliminate unnecessarily restrictive federal policies, guidelines and procedures.

11. Appendix A to Subpart B – Allowable Uses of TTP Funds - Appendix A has two subsections. Part A identifies over three dozen planning and design activities that TTP funds may be used for. Part B identifies 67 eligible construction and improvement activities that TTP funds may be used for.

Amend Part A of Appendix A as follows:

2. Planning, research, engineering and design of Tribal Transportation Facilities.

Amend Part B of Appendix A to read as follows:

1. Construction, reconstruction, rehabilitation, resurfacing, restoration, maintenance, and operational improvements for tribal transportation facilities.
6. Operation and maintenance of transit programs and Transit facilities...
49. Purchasing, leasing or rental of construction and maintenance equipment. All equipment purchase request submittals must be accompanied by written cost analysis and approved by FHWA.

The proposed changes to Appendix A to Subpart B fully incorporates expanded uses of TTP funds as required under 23 U.S.C. 202(a) amended by MAP-21.

SUBPART C – Tribal transportation Program Funding

Tribal Transportation Program Funding

12. 170.204 – What restrictions apply to TTP funds provided to tribes?

Amend 170.204 to read:

All TTP funds provided to tribes ~~may~~ can only be expended on eligible activities identified in section 170.115, including but not limited to all activities listed in Appendix A to Subpart B ~~and~~ so long as the project or activity is also included in an FHWA approved TIP per 23 U.S.C. 202(b)(4)(B). At the request of a tribe, the BIA shall promptly add eligible projects and activities to the FHWA approved TIP, in accordance with sections 170.423 – 170.427.

The proposed change reflects the fact that it is the requirement of MAP-21 to list a project or activity on an FHWA-approved TIP that determines allowable use of TTP funds. The reference to section 115 of the Part 170 regulations is a broader reference to eligible use of TTP funds since it includes eligible uses under Appendix A, eligible uses under the Part 170 regulations and title 23 of the United States Code. As amended above, section 170.204 is consistent with section 170.422(e) which recognizes that a TTP TIP, when approved by FHWA, “authorizes the eligibility of projects or activities for expenditure of TTP funds.”

TTP Inventory and Long-Range Transportation Plan (LRTP)

13. 170.226 – What facilities are included in the National Tribal Transportation Facility Inventory (NTTFI)?

(a) Amend 170.226 to add “(a)” before the text reading: “The NTTFI as defined by 23 USC”

(b) Renumber subsections a - g as roman numerals i through vii.

(c) Add new paragraphs (b), (c) and (d) to read:

(b) The Secretary of Transportation may include additional transportation facilities that are eligible for funding under the tribal transportation program in the inventory used for the national funding allocation if such additional facilities are included in the inventory in a uniform and consistent manner nationally.

(c) All bridges in the NTTFI shall be recorded in the national bridge inventory administered by the Secretary of Transportation under 23 U.S.C. 144.

(d) As used in (a)(ii) and (iii) ~~(b) and (c)~~ above, “owned” means having the authority to finance, build, operate, or maintain the facility. See 23 U.S.C. 101(a)(20).

As we have stated above, revised regulations for Part 170 should include the “catch-all” provision of 23 U.S.C. 202(b)(1)(D) that has been law since 2005. MAP-21 makes very clear

that only “eligible road mileage” generates funding under the formula for the TTP and is limited to a smaller subset of the NTTFI. Indian tribes may nonetheless add tribal transportation facilities to the Inventory as a precondition to expending TTP funds on projects and activities listed in the inventory and included in the tribes’ TIP. Tribal transportation facilities are defined under MAP-21 as “a public highway, road, bridge, trail or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory [NTTFI] described in section 202(b)(1).”

The regulations should reflect the full scope of facilities that Indian tribes may seek to add to the NTTFI and list as an eligible project or activity on their respective TIPs, even though the listed facility does not generate funding under the current TTP formula.

14. 170.228 – Are all facilities included in the NTTFI used to calculate tribal shares?

Amend the response in 170.228 to reflect the above-noted letter/numbering changes to 170.226.

Formula Data Appeals

15. 170.231 – What data used in the determination of tribal shares may be challenged or appealed?

Amend the response to 170.231 to read:

(a) Data used in the determination of tribal shares under the TTP may be appealed as follows:

(1) For the purposes of determining tribal shares, 23 U.S.C. 202(b)(3)(B) requires the use of the most recent data on American Indian and Alaska Native population within each Indian Tribe’s American Indian/Alaska Native Reservation or Statistical Area, as computed under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.).

(i) Any appeal of a tribe’s population figure used by the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) Indian Housing Block Grant Program must be directed to the Department of Housing and Urban Development (HUD).

(ii) Any appeal of the Secretary’s use of the American Indian/Alaska Native population figure in calculating shares under the TTP must be filed in accordance with 170.231(b) and (c).

(2) As required by 23 U.S.C. 202(b)(3)(B), the remaining factors used in determining tribal shares are based upon specific prior year data ~~and may not be appealed~~. Any appeal of the Secretary’s use of prior year data in calculating shares under the TTP must be filed in accordance with 170.231(b) and (c).

- (b) If an Indian tribe believes that the BIA has erred in determining its tribal shares for the TTP based upon miscalculation of the specific prior year data reflected in 23 U.S.C. 202(b)(3)(B), the Indian tribe shall notify the Office of Indian Services, Division of Transportation, BIA 1001 Indian School Road, N.W., Albuquerque, NM 87104 in writing setting out the reasons why the tribe believes its TTP share amount is incorrect.
- (i) The BIA Office of Indian Services shall, within 10 days of its receipt of the tribe's letter, notify the Indian tribe of its receipt of the letter and shall consider the information presented by the Indian tribe.
- (ii) Absent a written request by the BIA for a reasonable extension of time, which may not exceed an additional 30 days, within 30 days of its initial receipt of the tribe's letter, the BIA Office of Indian Services shall determine whether the Indian tribe's allegations are correct or whether the BIA's initial determination of the Indian tribe's allocation is accurate and send a written notification to the Indian tribe.
- (iii) The BIA Office of Indian Services' written response shall include sufficient detail to justify its decision.
- (iv) If a correction is required to be made to the Indian tribe's TTP shares, the BIA Office of Indian Services shall correct the funding level as soon as practicable and within the same fiscal year, if possible; otherwise, by the next fiscal year.
- (c) If an Indian tribe wishes to appeal the decision by the BIA Office of Indian Services in response to the Indian tribe's challenge, within 30 days of the Indian tribe's receipt of the written decision, it must file an appeal with the Interior Board of Indian Appeals (IBIA) in accordance with the requirements of 25 C.F.R. Part 2.
- (d) The failure of the BIA Office of Indian Services to issue a decision within the time frame provided in paragraph (b), shall be deemed a denial of the Indian tribe's challenge. In such instance, the Indian tribe shall have 45 days from the date the BIA Office of Indian Services was otherwise required to render a decision to file an appeal with the Interior Board of Indian Appeals (IBIA) in accordance with the requirements of 25 C.F.R. Part 2.

For the reasons detailed in Part I.1, we believe that principles of fairness and due process require the BIA, which calculates tribal shares for the TTP, to provide every Indian tribe the right to challenge agency calculations of tribal shares. While BIA is correct that formula allocations for the TTP are based on specific prior year data, it is possible that the BIA may make a mathematical or transcription error in determining a tribe's or a BIA Region's share of such funds and as a result allocate the wrong amount of TTP funds to an Indian tribe.

Flexible Financing

16. 170.300 – May tribes use flexible financing to finance TTP transportation projects?
170.303 – Can a tribe apply for loans or credit from a State Infrastructure bank?

Amend 170.300(b) to revise the second sentence of that subsection to read: “Tribes, BIA or FHWA may service Federal credit instruments.”

Amend 170.300(c) to revise the second sentence of that subsection to read: “Upon the request of a tribe, a BIA region or FHWA will provide necessary documentation to banks and other financial institutions.”

Amend 170.303 to revise the first full sentence to read: “Yes. Upon the request of a tribe, BIA region or FHWA will provide necessary documentation to a State infrastructure bank to facilitate obtaining loans and other forms of credit for a TTP project.”

The Part 170 regulations should reflect the changes to title 23 made in 2005 that authorize the Department of Transportation to contract directly with Indian tribes. FHWA includes flexible financing provisions in current TTP Agreements. The revised Part 170 regulations should reflect that tribes that carry out TTP programs, functions, services and activities under Program Agreements with FHWA should have the ability to request FHWA’s assistance to provide documentation to banks and other lending institutions when leveraging TTP funds as collateral for loans or bonds to finance eligible TTP projects.

Add the following new sections 170.305 and 170.307 to read:

170.305 May tribes include flexible financing provisions in Title I self-determination contracts, Title IV self-governance compacts, BIA government-to-government agreements and FHWA program agreements?

Yes. At the request of a tribe, the Secretaries shall include appropriate flexible financing provisions in these agreements to allow the tribe to make use of flexible financing in the development of TTP programs and projects.

170.307 How long can a TTP project financed in whole or in part through a flexible financing arrangement remain on a TTPTIP?

The Secretaries shall retain TTP projects on the TTPTIP until the flexible financing instrument has been paid in full by the tribe and take such other actions as are reasonably required to assist tribes in using flexible financing instruments to advance TTP programs and projects.

SUBPART D – Planning, Design, and Construction of Tribal Transportation Program Facilities

Transportation Planning

17. 170.427 – How may an approved current fiscal year TTPTIP be amended?

Amend the first sentence of 170.427(a) to read: “The current year TTPTIP may be amended to reflect ~~new proposed~~ additional projects and activities or a significant change in available fiscal year TTP funding.”

The phrase “additional projects and activities” is broad enough to encompass a variety of changes and modifications that an Indian tribe may request be made to an approved TTPTIP.

18. 170.444 – How is the NTTFI updated?

- a) Amend 170.444(a)(4) to read as follows: “(4) The Tribe must correct any errors or omissions in the data entries or return the corrected submittals back to the BIA Regional Office by June 15; If the BIA Regional Office finds no errors or omissions on the corrected submittals, the BIA Regional Office validates the data and forwards it to BIADOT for review and approval. If errors or omissions are found, the BIA Regional Office returns the submittals to the tribe along with a final request for corrections and a notification to the tribe that regional data must be validated by July 15;

We think it important that every Indian tribe be given the opportunity to ensure that its NTTFI inventory data is free of errors and omissions. The additional communication between the BIA Regional Office and tribe proposed in 170.444(a)(4) above is intended to promote accurate data entries in the NTTFI. The additional text is not intended to delay the BIA Regional Offices validation of submitted inventory data beyond July 15th.

- b) 170.444(b)(1) – Amend subsection (b)(1) to add the following sentence at the end of the subsection: “At the request of a tribe, FHWA may assist in updating NTTFI data as required under this part.”

The revised Part 170 regulations should reflect that an Indian tribe with a TTP Agreement with FHWA may enlist the assistance of FHWA to ensure that data is correctly and accurately included in the NTTFI to reflect additional tribal transportation facilities as well as working with BIA Regional Office staff.

19. Appeals

Amend Subpart D of the Part 170 regulations to permit Indian tribes to appeal a decision by the BIA to include a tribal transportation facility in the NTTFI or any other decision making by the BIA that may adversely impact any Indian tribe carrying out TTP programs, functions, services or activities. We recommend that the BIA develop an appeal process similar to our

recommendation in 25 C.F.R. 170.231 above (See Part II.15) as well as cross reference such appeal provisions with the alternate dispute resolution provisions now included in Subpart H (Miscellaneous) of the Part 170 regulations (see 25 CFR 170.934 et seq.).

Review and Approval of Plans, Specifications, and Estimates

20. 170.461 – May a tribe approve plans, specifications and estimates?

Amend the first sentence of 170.461 to read:

“An Indian tribal government may approve plans, specifications, and estimates and commence road and bridge construction with funds made available from the tribal transportation program through a contract or agreement under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), including an FHWA Program Agreement, BIA Government-to-Government Program Agreement or other appropriate agreement.”

21. 170.473 – What happens when a construction project ends?

Amend 170.473(d) to read:

“If 25 CFR Part 169 applies to the project, an affidavit of completion must be completed as required by 25 CFR 169.16. Failure to file an affidavit of completion shall subject the right of way to cancellation. An Indian tribe performing a TTP project under the ISDEAA, including an FHWA Program Agreement, BIA Government-to-Government Program Agreement or other appropriate agreement, is not subject to 25 CFR Part 169 because the tribe is acting for and on behalf of the Secretary in carrying out the project.”

Management Systems

22. 170.502 – Are nation-wide management systems required for the TTP?

Amend 170.502(b) to include a new subsection (b)(3) to read “maintenance.”

Renumber existing 170.502(b)(3) as (b)(4).

Given the egregious lack of funding for the BIA Road Maintenance Program, we recommend in the strongest terms possible that the BIA endorse and support the development of TTP Tribal Facility Maintenance Management Systems (TFMMS) to help tribes better monitor and maintain TTP facilities. However, TTP Tribal Facility Maintenance Management Systems (TFMMS) cannot become another unfunded mandate or it will defeat the purpose of helping tribes and the BIA make the best use of their extremely limited road maintenance funding.

Appendix A to Subpart D – Cultural Resources and Environmental Requirements for the TTP

23. Amend Appendix A to Subpart D to reflect Sections 1315, 1316, 1317 and related provisions of MAP-21, for information purposes only, to acknowledge the directive in MAP-21 to the Secretary of Transportation that he create additional actions categorically excluded from the requirements relating to environmental assessments or environmental impact statements under section 1508.4 of title 40, Code of Federal Regulations, and section 771.117(c) of title 23, Code of Federal Regulations. These include categorical exclusions in emergencies, categorical exclusions for projects within an existing right-of-way, and categorical exclusions for projects receiving less than \$5 million in federal funds.

As BIA and FHWA did in 2004 regarding FHWA’s ERFO Program (see 25 C.F.R. §§170.920 et seq.), the Part 170 regulatory provisions can be prefaced with the following statement relating to MAP-21’s directive to FHWA to create a new class of categorical exclusions:

“Sections 170.____ - 170.____ relating to activities or projects eligible for categorical exclusions under the National Environmental Policy Act are provided for information only and do not change the provisions of 23 C.F.R. Part ____ or existing guidance concerning categorical exclusions.”

Changes made by MAP-21 to the environmental compliance requirements of NEPA will in many instances expedite project approvals and result in major cost-savings for the Tribal Transportation Program if properly implemented by the BIA and FHWA when updating the Part 170 regulations.

SUBPART E – Service Delivery for ~~Indian Reservation Roads~~ Tribal Transportation Facilities

Funding Process

24. 170.602 - If a tribe incurs unforeseen construction cost, can it get additional funds?

Strike 170.602b. and restore the current regulatory response to 170.602.

Indian tribes carrying out ISDEAA, including FHWA Program Agreements, BIA Government-to-Government Program Agreements or other appropriate agreements all operate with limitations of cost clauses in their agreements as well as provisions that clearly state that a tribe is entitled to any additional funds available to the TTP on the same basis as other tribes.

In addition, the United States oversees tribally-operated TTP PFSA's subject to the trust responsibility owed to all Indian nations and the Indian people. If there are unforeseen circumstances beyond the control of the Indian tribe, the tribe may suspend performance of the contract or agreement until sufficient additional funds become available. The Secretary of the Interior and the Secretary of Transportation must make every effort to identify additional funds

to complete the project. Tribes operating under any of these contracts or agreements should be treated equally under the revised regulations.

25. Other Federal funds

Amend Subpart E (Service Delivery) to add a new section as follows:

170.604 – What other funds may be awarded to tribes under the ISDEAA, including an FHWA Program Agreement, BIA Government-to-Government Agreement and other appropriate agreements?

In addition to all funds made available under Chapter 2 of title 23, the cooperation of States, counties, and other local subdivisions may be accepted in construction and improvement of a tribal transportation facility. Any funds received from a State, county, or local subdivision available under Chapter 1 or Chapter 4 of title 23 shall be credited by the Secretaries to appropriations available for the tribal transportation program. Upon a tribe's request, Chapter 1 and Chapter 4 funds available to a tribe for a tribal transportation program project or activity may be awarded by the Secretary to a tribe's ISDEAA contract or agreement, including FHWA Program Agreement, BIA Government-to-Government Agreement or other appropriate agreement.

As noted above in Part I.2, and as more fully detailed in our enclosed memorandum of February 4, 2013, 23 U.S.C. 202(a)(9) requires FHWA to promote the cooperation of States, counties, townships and boroughs in the construction and improvement of eligible tribal transportation projects. The statute clearly provides that "any funds" received from States and counties "shall be credited to appropriations" available to the TTP. Existing regulations, however, do not authorize the transfer of Chapter 1 Federal-Aid and Chapter 4 safety funds to tribes using existing FHWA Program Agreements, BIA Government-to-Government Agreements or P.L. 93-638 contracts and self-governance agreements. This delays the prompt use by tribes of appropriations available for tribal transportation program projects and activities.

We urge the BIA and FHWA to rely upon existing statutory authorities within title 23 and the requirements of 170.103(g) to reduce, streamline and eliminate unnecessarily restrictive transportation policies, guidelines or procedures to the effective and prompt use of funds for the construction or improvement of tribal transportation facilities.

Contracts and Agreements

26. 170.613 - When do BIA and FHWA determine the amount of funds needed for non-contractible non-project related functions?

Amend the second sentence of 170.613 to read:

“A portion of these funds are only for use by BIA and FHWA transportation personnel performing program management and oversight, and project-related administrative activities which comprise inherently federal functions.”

Under 23 USC 202(b)(7)(E), the FHWA must provide to a portion of the 6% funds to any Tribe that has entered into FHWA Program Agreements which “equals the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project.” Furthermore, MAP-21 clearly states that “not more than 6 percent may be used by the Secretary or the Secretary of the Interior for program management and oversight [PM&O] and project-related administrative expenses [PRAE].” There is nothing in this sentence, or anywhere else in MAP-21 that mandates the agencies to expend the full 6 percent or that characterizes everything the agencies do with the TTP funds as inherent federal functions that cannot be delegated to an Indian tribe. Indeed, under a plain reading of MAP-21, the BIA and FHWA are obligated to transfer any unused 6% funds to the TTP for use on TTP projects. There is no legal or policy mandate for the FHWA and BIA to shield the entire 6 percent from appropriate use by Indian tribes. To the contrary, 23 U.S.C. 202(b)(7)(E) requires FHWA to calculate the BIA’s share and add “such additional amounts” to an Indian tribe’s TTP tribal shares.

27. Special provisions for FHWA Program Agreements

Amend Subpart E (Service Delivery) to add a new section 170.627 to read:

170.627 – What special provisions apply to FHWA Program Agreements with tribes?

In addition to the tribal shares of TTP funds allocated by the Secretary to a tribe under Subpart C of this part, FHWA shall add such additional amounts as FHWA determines equal the amounts that would have been withheld for the costs of the BIA for administration of the program or project.

New section 170.627 implements 23 U.S.C. 202(b)(7)(E) as amended by MAP-21.

28. Prompt transfer of TTP shares by the BIA to Indian tribes

Amend Subpart E of the Part 170 regulations to add the following new provision:

170.627 - How soon must the Secretary distribute TTP funds to tribes?

Not later than 30 days after the date on which funds are made available to the Secretary the funds shall be distributed to, and made available for immediate use by eligible Indian tribes in accordance with the formula for distribution of funds under the tribal transportation program.

As we noted in Part I, proposed section 170.627 implements the title 23 United States Code requirement that has been law since SAFETEA-LU was enacted in 2005. Three events have made it easier for the BIA to distribute TTP funds more promptly to Indian tribes than was the

case under SAFETEA-LU. First, the BIA has updated P.L. 93-638 contracts and agreements as well as developed the Government-to-Government (G2G) agreements under authority of 23 U.S.C. 202(a)(2)(B) which permit tribes to assume the entire TTP from the Secretary of the Interior, rather than a single TTP project. Thus, awarding TTP tribal shares is a matter of updating the award instrument's funding agreement. Second, Congress overhauled the funding formula for the TTP to provide greater certainty of annual tribal shares. We suspect that there will be few appeals that in the past delayed the BIA's distribution of tribal shares of IRR Program funds to Indian tribes. Third, the BIA overhauled its financial management system (FBMS) in 2012 to expedite the transfer of appropriated funds from Central Office to BIA Regional Offices for award to Indian tribes.

As a result, the BIA should have little trouble promptly distributing tribal shares of TTP funds within the 30 day period required under title 23. This statutory provision should be reflected in the Part 170 regulations. The long delays in TTP payments that have occurred over the past decade violated this express statutory mandate and created great hardships for Tribes, especially those with limited construction seasons. The prompt payment of TTP funds should be one of the BIA and FHWA's top priorities going forward.

SUBPART F – Program Oversight and Accountability

29. 170.703 – What program reviews do the Secretaries conduct?
170.704 – What happens when the review process identifies areas for improvement?

Amend the sections 170.703 and 170.704 to limit Secretarial reviews and monitoring of TTP activities to those activities carried out by BIA Regional offices. Monitoring and enforcement actions against Indian tribes for acts or omissions relating to performance of the TTP and related programs of the Department of Transportation and Department of the Interior are set out in the contracts and agreements between the tribe and the respective agency. The requirements for tribes to develop “corrective action plans” and time tables for reporting imposed by the draft regulation provisions are unlawful and inconsistent with the provisions of the ISDEAA and the terms and conditions of the contracts and agreements now in place between the agencies and Indian tribes. The BIA and FHWA should not impose new monitoring obligations on Tribal governments that are contrary to the ISDEAA in the guise of updating the regulations to conform to the legal changes in SAFEATEA-LU and MAP-21. If such changes are to be proposed, they must be done through an appropriate negotiated-rulemaking process.

SUBPART G – Maintenance Programs

30. 170.801 – What is the BIA Transportation Facility Maintenance Program?
170.803 – What facilities are eligible under the BIA Road Maintenance Program?

Amend 170.801 to read as follows:

Congress provides funding for the BIA ~~Transportation Facility~~ Road Maintenance Program in the annual Department of the Interior appropriations acts. It is used for maintaining the BIA Road System, ~~and~~ BIA transportation facilities, tribally-owned roads

and bridges and, subject to the requirements of section 170.803(a)(2), other facilities eligible under the BIA Road Maintenance Program identified in this subpart. Appendix A to this subpart contains a list of activities that are eligible for funding under the BIA transportation facility maintenance program.

There is nothing in the President's Budget request to Congress for FY 2014 that restricts the use of appropriated funds for the BIA Road Maintenance Program to BIA System routes only, thereby excluding the use of such funds for tribally-owned routes. Nor do we find any authority in MAP-21 for the BIA to narrowly define BIA System to exclude tribally owned roads and bridges.

As noted above, 25 U.S.C. §318a should be read as requiring the BIA to treat BIA Road Systems Roads and Tribal Road Systems equally. Both types of facilities are wholly dependent upon the BIA Road Maintenance Program to fund routine and emergency road maintenance needs. Furthermore, 23 U.S.C. §202(a)(8)(B) requires the Secretary of the Interior to ensure that the option to supplement BIA Road Maintenance Program funds with TTP tribal shares, repurposed for maintenance needs, is "supplemental to, and not in lieu of, any obligation of funds by the BIA for the Road Maintenance Program." The Interior Department has not met this statutory and trust responsibility obligation in section 202(a)(8)(B) by narrowing the authorized uses to which BIA Road Maintenance Program funds may be expended.

The BIA and FHWA proposed changes to Subpart G of the Part 170 regulations are unlawful. The agencies would improperly and wrongly restrict the use of BIA Road Maintenance Program funds to BIA System facilities only, thereby making tribally-owned roads and bridges ineligible for BIA Road Maintenance Program funding and making Tribally owned roads and bridges wholly dependent on repurposed TTP tribal shares under 23 U.S.C. 202(a)(8)(B), contrary to the clear intent of the statute. The BIA's actions would also undermine the Administration's Making Communities Safer initiative by making tribal transportation facilities less safe.

The agencies' unilateral decision is not only contrary to existing law and regulations, but would also violate ISDEAA contracts and agreements. Numerous Pub. L. 93-638 contracts and agreements authorize tribes to expend BIA Road Maintenance Program funds on BIA Road System and tribally owned transportation facilities. In some instances, an Indian tribe may also elect to maintain non-BIA and non-Tribal transportation systems when the tribe determines that maintenance is required "to ensure public health, safety and economy" and the tribe executes an agreement with the owning public authority. See 25 C.F.R. §170.803(a)(2). If implemented in a final rule, the agencies would create accounting, contract and liability problems by unilaterally insisting that BIA Road Maintenance Program funds may no longer be used by tribes or the BIA to maintain tribally-owned transportation systems or, under the circumstances detailed above, facilities owned by other public authorities.

Section 170.803 of the Part 170 regulations was developed through careful and thoughtful consensus, government-to-government rulemaking pursuant to the Negotiated Rulemaking Act, and the agencies do great harm by rewriting the section to limit tribal decision making for this public safety program. We urge the agencies in the strongest terms possible to reverse their ill-advised decision to propose restrictions to the use of BIA Road Maintenance Program funds in

this manner. It is contrary to law and common sense. Today, Indian tribes carry out routine and emergency road maintenance activities using BIA Road Maintenance Program funds, “repurposed” TTP shares under authority of 23 U.S.C. 202(a)(8)(B), tribal and other discretionary funds.

31. 170.806 – 170.813

Amend the draft regulation to restore 25 C.F.R. §§ 170.806, 170.807, 170.810 and 170.813.

The deleted Subpart G provisions address important maintenance program activities such as the TTP Transportation Facilities Maintenance Management System (TTP TFMMS) (170.806), the minimum components of the TFMMS (170.807), the TTP Coordinating Committee’s role in developing the TTP TFMMS (170.810) and when access to a TTP facility may be restricted (170.813).

Indian tribes should develop and implement sensible asset management and TTP TFMMS to extend the useful life of TTP-assisted facilities. We do not understand nor endorse the agencies’ proposals to rewrite Subpart G of the Part 170 regulations.

For the last 30 years funding for the BIA Road Maintenance Program has remained flat at approximately \$25 million. Had the program realized a modest increase of 5% annually, the Program today would be funded at \$90 million.

If transportation facilities in Indian country are going to be built and maintained to improve economic and safety conditions in Indian country, the Department of the Interior must increase funding for the BIA Road Maintenance Program and the Secretaries of the Department of Transportation and Department of the Interior must take seriously their statutory obligations under 23 U.S.C. 116 and 202(a)(8)(B) and 25 U.S.C. 318a to ensure that maintenance funds keep pace with tribal needs.

SUBPART H – Miscellaneous Provisions

Emergency Relief

32. 170.920 et seq. – Emergency Relief

We support revised section 170.926 that allows existing award instruments used by Indian tribes for the TTP to be the award instrument through which Emergency Relief for Federally Owned Roads (ERFO) funds may be awarded and used by Indian tribes to remedy damage to eligible transportation facilities.

We urge the agencies to amend other Emergency Relief provisions of Subpart H to reflect new statutory authority under Division B of Public Law 113-2, the Sandy Recovery Improvement Act of 2013 (Jan. 29, 2013), which amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act, to authorize the Chief Executive of an affected Indian tribal government to

submit a request for a declaration by the President of the United States that a major disaster exists, in addition to petitioning the governor of the affected state to request such declaration by the President.

As noted above, the regulations may specify that the provisions are included for information purposes only and do not supersede other agency regulations or guidelines.

Reporting Requirements and Indian Preference

33. Data Collection

Amend Subpart H of the Part 170 regulations to add a new section as follows:

170.918 – What restrictions apply to the Secretaries collection of data under the TTP?

The Secretaries shall collect and report data necessary to implement the Tribal Transportation Program and the Federal Lands Transportation and Federal Lands Access Programs in accordance with the ISDEAA, including –

(i) inventory and condition information on Federal lands transportation facilities and tribal transportation facilities; and

(ii) bridge inspection and inventory information on any Federal bridge open to the public.

New section 170.918 above implements section 201(b)(6)(A) of MAP-21.

On behalf of the above-noted tribal clients, thank you for considering our comments and recommended changes to the draft Part 170 regulations.

Respectfully Submitted,

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Via Electronic Mail

**Tribal Discussion Points
Concerning the BIA/FHWA Draft Changes to the
Part 170 Tribal Transportation Program (TTP) Regulations
for use in the BIA/FHWA Tribal Consultation Meetings
(May 14 – 21, 2013)**

We offer the following discussion points to our Tribal Transportation Coalition clients who plan to attend any of the three tribal consultation meetings that the Bureau of Indian Affairs (BIA) has announced will be held in May in Anchorage (May 14), Phoenix (May 16) and Minneapolis (May 21) to discuss the draft changes that the BIA and the Federal Highway Administration (FHWA) propose be made to the Part 170 regulations which govern the Tribal Transportation Program (TTP), the former Indian Reservation Roads (IRR) Program. Tribes may submit comments concerning the draft changes to the Interior Department at draft.25cfr170consult@bia.gov by June 14, 2013. The discussion points highlight some of the more serious concerns we have with the changes the agencies have proposed.

Overview: In most instances, the draft changes to the Part 170 regulations made by BIA and FHWA simply carry out the administrative task of updating the regulations to reflect the statutory changes mandated by SAFETEA-LU and MAP-21, including changing references to the Indian Reservation Roads Program to the Tribal Transportation Program. Yet in a number of important instances, the draft revisions restrict tribal flexibility, preclude tribal access to the BIA's PM&O and PRAE funds, do not permit the direct transfer to tribes of Federal-Aid and State-administered highway safety funds, do not consistently reflect the expanded role played by FHWA in the Tribal Transportation Program, and deny

tribes the right to challenge important agency determinations concerning funding allocations or the addition of facilities to the inventory. We found little innovation or creativity to improve the regulations and streamline the TTP.

It is our opinion that the draft changes and recent actions taken by the agencies:

- Do not honor meaningful tribal consultation (the draft changes made by BIA and FHWA were presented to TTP Coordinating Committee for comment; tribes were not first consulted by the agencies concerning whether additional provisions warranted changes to improve the program, no redline edition was posted online or distributed to tribes to easily track the draft changes proposed, and efforts by the TTP Coordinating Committee to meet directly with the BIA Assistant Secretary and FHWA Associate Administrator were declined);
- Do not reflect a careful and thoughtful examination by BIA and FHWA concerning how best to efficiently streamline the TTP to improve transportation infrastructure and transportation systems in Indian country to take advantage of a once-in-a-decade opportunity to revise the regulations to benefit Indian tribes carrying out Federal obligations and responsibilities with limited funds; and
- Do not interpret Federal laws and regulations to “facilitate” the transfer of programs to tribes under appropriate award instruments as required under current regulation (25 CFR 170.2(e)) or “liberally construe” laws and regulations for the benefit of Indian tribes to “implement the Federal policy of self-determination and self-governance.” 25 CFR 170.2(h).

We highlight below what we believe to be agency overreach in the draft. We encourage tribal elected and transportation officials to make known your objections and request meaningful consultation.

1. Denial of Formula Data Appeals (Subpart C, § 170.231) – Tribes should object to the rewrite of 170.231 that entirely precludes tribal appeals to BIA or FHWA of the data relied upon by the agencies to calculate “tribal shares” under the Tribal Transportation Program, with the exception of American Indian and Alaska Native (AIAN) population data, which may only be appealed to HUD. BIADOT and FHWA may make mathematical or transcription errors when using the NAHASDA AIAN population data, the “historic” RNDP and PAF data, or the revised MAP-21 funding factor data for the TTP (i.e., “eligible road mileage,” NAHASDA AIAN population figures, or the seven-year average of RNDP/PAF funding). Amend the Part 170 regulations to permit Indian tribes to bring administrative challenges and appeals against the BIA concerning disputes over “tribal shares” calculations as currently provided in 25 C.F.R. §170.231. Tribes should also be permitted in the Part 170 regulation to appeal agency denials concerning a tribe’s addition of a proposed road or primary access route that is not currently listed on the National Tribal Transportation Facility Inventory (NTTFI), or disputes which arise from tribal updates to their TIP, all preconditions to the allowable use of TTP funds on eligible TTP facilities.
2. BIA 6% Program, Management and Oversight (PM&O) and Project-Related Administrative Expenses (PRAE) – As defined in draft 170.5 (Definitions), the term “**TTP program management and oversight funds,**” and §§170.612-613 (determination of “non-contractible, non-project related

functions”), would shield the BIA from sharing with Indian tribes any portion of its 6% PM&O and PRAE allocation, by representing that all such funds are used for “non-contractible” functions. That is factually and legally incorrect and contrary to existing agency practice. Amend 170.2 and 170.612 and 170.613 to reflect the ability of FHWA to negotiate with BIA, and to share with tribes, a portion of the BIA’s PM&O and PRAE funds when tribes assume the Secretary of the Interior’s duties for the TTP under an FHWA TTP Agreement.

3. Use of Pub. L. 93-638 contracts and agreement, FHWA and other BIA/FHWA instruments for transfer of Federal-Aid and State-administered Highway Safety funds to Indian tribes – While tribes are pleased to see that draft section 170.926 is revised to allow tribes to administer approved Emergency Relief for Federally Owned (ERFO) Roads repairs under a self-determination contract, agreement, FHWA Program agreement and “other appropriate agreements” (e.g., Interior Government-to-Government Agreements), the draft changes do not authorize tribes to receive Chapter 1 Federal-Aid funds, or State-administered highway safety funds under Chapter 4 (170.144(a)), using available TTP award instruments, thereby complicating the prompt transfer and use by tribes of Federal-Aid and Highway Safety funds. Allowing Indian tribes to use a single award instrument to receive all their title 23 United States Code funds for eligible Tribal Transportation Program facilities is one of the most effective measures that FHWA and BIA can take to improve Tribal transportation infrastructure and safety on tribal transportation facilities. MAP-21 requires FHWA to promote the cooperation of States and counties in the construction and improvement of eligible tribal transportation projects and requires “any funds” received from a State or county or local subdivision to be “credited to appropriations available for the tribal transportation program.” 23 U.S.C. §202(a)(9). Amend the Part 170 regulations to authorize direct transfers of Federal-Aid and State-administered Highway Safety funds to tribes using the TTP award instruments.
 - a) As concerns TTP’s 2% safety funding, FHWA issued a Federal Register Notice of Funding Availability (NOFA) and request for comment (April 30, 2013), concerning the safety program that would require tribes to submit competitive safety grant applications to Grants.gov (using the System for Award Management (SAM)), when many tribes and Alaska Native villages are on record with FHWA complaining that SAM – a web-enabled government wide application – has numerous system flaws and many tribes have been unable to register. SAM registration is required to use Grants.gov. The NOFA exemplifies the lack of prior tribal consultation.
4. Omission of a draft rule for primary access routes – The draft regulation does not include a provision concerning the criteria for including or adding primary access routes to the NTTFI. While the tribal consultation meetings will discuss the criteria for retaining or adding primary access routes to the Inventory, the agencies should have included in the draft changes the criteria for adding or retaining a primary access route in the NTTFI Inventory for tribal consideration and comment. Primary access routes were defined in SAFETEA-LU (2005) and were the subject of TTPCC consideration and consensus deliberations for several years.
5. Complicates the Planning for New Road and Bridge Construction – Sections 170.460(b)(2) and 170.473(d) of the draft regulation would raise uncertainty in TTP project planning by requiring that a PS&E package must include “certification of the required right-of-way, easement, or public taking

documentation clearances,” and raises an issue of whether the Part 169 (Right-of-Way) regulations apply, including the requirement to secure an affidavit of completion of a ROW to file and record with the BIA under 25 CFR 169.16, in order to properly register a ROW over Indian lands. Tribes successfully fought to exclude a reference to the Part 169 regulations during the 1990’s Negotiated Rulemaking that drafted the Part 170 regulations because the “tribal and Federal sides agreed . . . that relying on 25 CFR Part 169 as the only reference for rights-of-way over Indian lands was not appropriate since tribes are not required to obtain rights-of-way when constructing IRRs across their own reservation” (see 69 Fed. Reg. 43090, 43092, July 19, 2004 (Final Part 170 Rule)). During the Negotiated Rulemaking it was the Federal view that “any issues beyond the scope of the existing 25 CFR 169 are properly dealt with in a future revision of part 169 and are inappropriate for inclusion in this rule or for public comment.” See 67 Fed. Reg. 51341, August 7, 2002 (Part 170 NPRM). The Part 170 regulations should retain the consensus “right-of-way clearances” phrase in 170.460(b)(2) and further streamline and simplify the planning and construction process phases of an eligible TTP project.

6. Omission of other SAFETEA-LU and MAP-21 provisions – The draft revisions to the Part 170 regulations do not address:

- SAFETEA-LU’s and MAP-21’s 30-day rule - SAFETEA-LU’s requirement for the BIA to distribute TTP shares to tribes “not later than 30 days after the date on which funds are made available to the Secretary of the Interior” (23 U.S.C. §202(b)(4)(A) is not referenced in the revised rule (see, e.g., draft section 25 C.F.R. §170.203). Amend 170.203 to reference this seven year old law to expedite the transfer of TTP funds to tribes.
- The use of Categorical exclusions to expedite project approvals – The revised rule should reference the directive to the Secretary of Transportation under MAP-21 to designate any project that is within an “existing operational right-of-way,” or that receives less than \$5 million in Federal funds, or that concerns qualifying projects for the repair or reconstruction of a road, highway, or bridge in operation or under construction and damaged by an emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as actions categorically excluded from the requirements relating to environmental assessments or environmental impact statements . See sections 1316 and 1317 of MAP-21. Most TTP-funded projects will likely qualify for a categorical exclusion under this MAP-21 provision, yet this streamlining MAP-21 provision is not reflected in the draft regulation.
- The ability to expand the type and character of transportation facilities eligible for listing on the National Tribal Transportation Inventory – Tribes have fought for years to ensure that public transit facilities, ice and board roads, and marine facilities could be included in the Inventory, if only to ensure that IRR/TTP funds could allowably be used on such facilities. Consensus motions were passed by the TTP Coordinating Committee concerning these issues. Draft section 170.226 omits MAP-21 statutory text that permits the inclusion in the NTTFI of “additional transportation facilities” if such facilities are included in the inventory in a “uniform and consistent manner nationally.” See 23 U.S.C. § 202(b)(1)(D). Expressly include public

transit and marine facilities, ice and board roads in the NTTFI, and reference MAP-21's "additional transportation facilities" language in the Part 170 rule.

- Eligibility for Additional Funds – In draft section 170.602(b), tribes object to the notion that only Indian tribes carrying out contractible transportation programs and functions under a Pub. L. 93-683 contract or agreement may request additional funding from the Secretary due to unforeseen circumstances, when all other agreements (FHWA and BIA G2G Agreements) include "limitation of cost" clauses and have provisions that clearly allow tribes to seek additional transportation funding from the Secretary "on the same basis as other Indian tribes." Revise 170.602(b) to clarify the right of every Indian tribe to request additional funding.

7. Additional Draft Regulation Changes Tribes Object to –

- the draft 170.803 narrows existing regulatory authority of Indian tribes to use BIA Road Maintenance Program funds on BIA and non-BIA System routes at the tribe's election and when required to "ensure public health, safety and economy" that have been in place since the Part 170 regulations were published in the Federal Register in 2004.
- the deletion of section 170.807 (Subpart G – Maintenance) by the BIA and FHWA which addresses the importance of the TTP Transportation Facilities Maintenance Management System or the deletion in section 170.810 of the role the TTPCC should play with BIA to develop such Management Systems. Deleted 170.807 set out a guide that Indian tribes could use to budget maintenance program funds and identify future transportation facility maintenance needs through such means as predicting facility deterioration, tracking and reporting actual maintenance costs and activities, forecasting short- and long-term budget needs, etc.
- Definition of "Construction contract" (170.4) – The BIA attempts to fold road maintenance projects within the definition of "Construction contract" in the draft regulation section 170.4. Road maintenance is not a construction activity under Pub. L. 93-638. MAP-21 defines the term "Construction" and the BIA's efforts to expand the term do not streamline the Program.
- Inconsistent reference to FHWA in numerous provisions of the Part 170 regulations to reflect FHWA's role as an awarding and oversight agency with direct agreements with tribes (e.g., FHWA, as well as BIA, should be referenced in the Part 170 provisions concerning the use of flexible financing arrangements under 170.300 et seq.)

8. Cost-to-Construct Tables – The draft rule appears to retain the Part 170 regulation Cost-to-Construct (CTC) tables. With a statutorily mandated formula which does not require current CTC calculations, what is the purpose of including the CTC tables in the revised rule?