



LeRoy N. Shingoitewa
CHAIRMAN

Herman G. Honanie
VICE-CHAIRMAN

June 14, 2013

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

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

Tribal Consultation and Informational Meeting Comments
U.S. Department of the Interior
BIA Office of Indian Services, Mail Stop 4513 MIB
Washington, D.C. 20240
Emailed

RE: Hopi Tribe's Comments on the Proposed Revision 25 CFR Part 170 Regulations

Dear Chief LeRoy M. Gishi and Director Robert W. Sparrow, Jr.,

As you are aware, the Hopi Reservation, in northeastern Arizona, occupies part of Navajo and Coconino counties and encompasses approximately 1.5 million acres. With the large land base, transportation and roads are a serious safety concern and a high priority to the Hopi. While we welcome the opportunity to submit our comments (Exhibit A) concerning the proposed implementation of the draft revisions governing the Tribal Transportation Program, we are dismayed that the time frame allowed for the tribal consultation and comment period has been severely curtailed.

The Tribe feels the short frame of time was inadequate to thoroughly analyze the "draft" and we were also dismayed that Department of Interior Bureau of Indian Affairs (BIA) was not open to discussing MAP - 21 since the resolution implements MAP-21. It appears from discussions with other Indian Tribes, our concerns are mutual. The Hopi Transportation Task Team, chaired by Hopi Tribal Council Representative Davis Pecusa, endorses the comments submitted by the Coalition of Northern Tribal Transportation (Exhibit B) and the Affiliated Tribes of Northwest Indians (Exhibit C). Please consider our comments in your consideration of the proposed revision. Please continue to copy Rep. Davis Pecusa on Tribal Transportation issues.

Respectfully submitted,

LeRoy N. Shingoitewa, Chairman

c: Rep. Davis Pecusa, Hopi Transportation Task Team Chairman

Attachments (3)

Hopi Tribe
25 CFR Part 170 Regulation Review Questions and Comments Regarding Title 23 U.S.C.
June 10-11, 2013

1. Explain fiscal rule 201(b) and impact on old money and projects.
 - a. Explain how the provisions of Section 201(B) will impact funds distributed prior to MAP-21. How will these impact tribes that have to build up funds over several years to generate enough to construct a project?
 - b. How can the funds that are not unexpended after 3 years be returned to the tribe?
 - c. How do tribal shares that are prior year funds under BIA management transferred to a tribe that initiates a FHWA contract?
2. Inadequate time to comment, now on a fast track
 - a. The BIA and FHWA have not allowed sufficient time for tribal consultation on these complicated proposed regulations. There should be more tribal consultation on a local level.
 - b. Many tribes do not have the resources, including budget analysts, policy specialists, attorneys, and other technical expertise to properly assess this regulation. The BIA and FHWA should provide more detailed information and data to tribes that explain the impact of the proposed rule.
3. What rules apply to BIA and DOT administration of TIP?
 - a. The proposed regulation does not provide clear and consistent guidance to BIA and DOT program operations. Tribes have concerns about inconsistent application of TIP rules in different BIA regions and this can be corrected by having regulations that apply across the agency.
 - b. Examples of areas that require federal agency regulation are right-of-way acquisition and management, appraisal, environmental review and tribal share allocation. Current right-of-way acquisition lacks a defined process for BIA processing right-of-way documents. The federal decision making process should be streamlined and consistent with levels of responsibility identified in the regulation.
 - c. Need a consistent regulation for acceptance of a completed road construction project into the BIA system.
4. Who is responsible for administering the rule?
 - a. The regulation should clearly identify the statutory authority it is exercising and the federal agency responsible for implementing and enforcing that regulation or activity. Currently the regulation mixes the various MAP-21 requirements into the regulations without identifying how the agency is to implement or oversee the activity.
5. What is the impact on approved LRTPs?
 - a. How are tribes with existing LRTPs impacted regarding funding, inventory, references to old funding categories? Will LRTPs developed under SAFETY-LU authority still be considered valid, and if not, when will they have to be revised?
6. Clarify 201(c) (3) & (4) TIIP development and inclusion with state.
 - a. Tribes need further guidance on the meaning of regional significance and determining

- which projects should be subject to state and MPO participation.
- b. Will this apply to rural planning organizations?
7. Clarify 201(c)(S) asset management
 - a. MAP-21 requires the Secretary of Interior and Transportation to implement safety, bridge, pavement, and congestion management systems for facilities funded under the tribal transportation program in support of asset management. The proposed regulation does not follow this legislative requirement.
 8. Clarify 201(c)(6) authorities and activities and connection to 638
 - a. MAP-21 section 201(c)(6) requires the Secretaries to collect and report data necessary to implement the tribal transportation program in accordance with ISDEA, including inventory and condition information on tribal transportation facilities and bridge inspection and inventory information. This provision should be implemented in the regulations to identify the policies and procedures to be used in collecting and disseminating this data. The data should be provided to tribes on a regular basis in a format they can readily use.
 - b. Regulations should include provisions for tribes to contract for this activity and identify funding for this data collection function.
 9. Does Buy Indian Act and 7(b) apply to FHWA contracts? 202(a)(10)(B)
 - a. Are tribes that receive their TIP funds from FHWA subject to the requirements of 202 (a) (10) (B)?
 10. Clarify 202(b) (1) and 201(c) (6) (b) who's standard applies to inventory data collection?
 - a. MAP-21 Section 201(c)(6)(b) requires the Secretary of DOT to develop data collection standards which would include inventory data and Section 202(b)(1) requires the Secretary of the Interior to maintain the TIP Inventory. The proposed draft regulation does not contain the standards for data collection that Interior must follow in maintaining the TIP Inventory. These standards from DOT and policies and procedures on how the TIP Inventory will be maintained by DOI must be included as part of this regulation.
 11. Rules for determining majority of AI/AN residents.
 - a. Section 202(b) (B) (v) allows the inclusion of public roads within tribal reservations, villages and communities in which the majority of residents are American Indians or Alaska Natives. The proposed rule does not provide a methodology for determining which public roads fall within this category.
 12. Rule for dealing with undocumented ownership roads
 - a. Tribes have inherited a road system from the BIA, states and counties that do not have documented road right-of-way for many of the roads. The draft regulation does not address this significant issue that leaves tribes with the burden of researching easements and quieting title on many miles or roads. The draft regulation should address how the BIA will take responsibility for clarifying road ownership status and acquisition of right-of-way where such acquisition had not been performed.
 13. Are you reporting roads built with Highway Trust Funds since 1983 tribes are

responsible for updating the road inventory data. Section 202(b) (B) (IV) allows roads that were constructed or reconstructed with funds from the Highway Trust Fund under the Indian reservation roads program since 1983. The draft regulation should provide a process for BIA to follow to make this information available within a specific timeframe upon tribal request. A report that identifies the roads qualifying under this provision should be provided to tribes.

14. Rules for primary access routes

- a. The draft regulation does not include a provision concerning the criteria for including or adding primary access routes to the NTTTTFI. The agencies should have included the criteria for adding or retaining a primary access route in the NTIFI for tribal consideration and comment. Primary access routes should be limited to not exceed 15 miles in length. Primary access routes were defined in SAFETEA-LU and were the subject of TIPCC consideration and consensus deliberations for several years.

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

- a. MAP-21 Section 202(b) (2) provides that notwithstanding sections 563(a) and 565(a) of title 5, the Secretary of the Interior shall maintain any regulations governing the tribal transportation program. Within Sections 201 and 202 there are numerous provisions requiring standards and regulations to be developed by both DOT and DOI. The proposed regulation does not address the overall policies and procedures regarding program delivery between two federal agencies. In particular, the draft regulation does not implement Section 202(b) (2). In past years the two agencies operated under a Memorandum of Understanding or Stewardship Agreement that clarified the authority and responsibilities of each agency in implementing the IRR Program. The regulations should address program administration for each agency including delegations of authority and guidance or policy responsibility. The regulation should address the role of BIA regarding tribes that choose to contract with FHWA, and tribes that contract with BIA obtaining services from FHWA.

16. How do proposed bridges get funded?

- a. MAP-21 Section 202(d) (2) creates a 2 percent set-aside for bridges. The draft regulations do not address this provision or provide a procedure for how those funds will be distributed. TIP Bridge Program regulations should either be included in the draft 25 CFR 170 regulations or be subject to a separate regulation. The 2 percent bridge set-aside should be limited to use for BIA and tribally owned bridges.

17. Clarify tribal PS&E approvals under direct FHWA agreements

- a. Clarification is needed regarding 23 USC Section 202(b) (S) Health and Safety Assurances. The law recognizes tribal authority to approve plans, specifications and estimates on road and bridge projects with funds made available from the tribal transportation program through a contract or agreement under P.L. 93-638 under certain conditions. Does this allow tribes receiving funds directly from FHWA to exercise their PS&E approval authority? The regulations require a tribal resolution be submitted with each PS&E package but that requirement is not in the legislation and it should be removed.

18. Clarify difference between 202(b)(6)(a)&(b) and 202(b)(7)(a)&(b)

- a. Please provide clarification on the difference between 202(b)(6)(A)&(B) and 202(b)(7)(A)&(B). Both provisions refer to contracts and agreements with Indian tribes. These provisions are not reflected in the draft regulations.
19. Clarify 202(b) (7) (D) - is this the authority for direct FHWA contracts?
- a. Under 23 USC 202(b) (7) (D) FHWA is authorized to enter into funding agreements with tribes to carry out a tribal transportation facility program or project under subparagraph (A). Subparagraph (A) refers to agreements authorized under P.L. 93-638. Are the agreements entered into between a tribe and FHWA considered P.L. 93-638 agreements, even though P.L. 93-638 does not apply to the Department of Transportation? This question is important because of the role tribes take in replacing the BIA in operating a funded BIA program or project and their protection from liability under the Federal Tort Claims Act.
20. Clarify 202(b)(7)(J) – what authority (law) exists to authorize DOI to provide transportation services
- a. 23 USC Section 202(b)(7)(J) provides for transfer of remaining funds from a terminated Tribal-FHWA contract to the BIA and for the BIA to provide continued transportation services in accordance with applicable law. Under MAP-21, there is no longer a direct BIA road program and all of the program authority is assumed to be passed on to tribes except for inherent federal functions. What legislative authority exists for BIA to engage in activities under the Tribal Transportation Program outside of their inherent federal functions?
21. Explain administration of 202 planning and 201 planning - TTIP approvals
- a. There are two seemingly conflicting and inconsistent transportation planning provisions for the Tribal Transportation Program in 23 USC Section 201 (c) and 202(c). Section 201(c) requires:
 - i. the Secretaries of DOT and DOI to implement transportation planning procedures for TTP facilities that is consistent with statewide and metropolitan planning organization planning processes
 - ii. Secretary of DOT approval of tribal transportation improvement programs
 - iii. Joint DOT and DOI asset management systems and
 - iv. Joint DOT and DOI data collection and reporting for road and bridge inventory and bridge inspection.
 - b. Section 202(c) creates a 2 percent set-aside for tribal transportation planning and requires tribes to carry out a transportation planning process in accordance with section 201(c). It also states that funded projects must be selected by tribes from the transportation improvement program and subject to approval of the Secretaries of Interior and DOT.

The draft regulations do not reflect the requirement in 201(c) for approval of tribal transportation improvement programs. Rather the draft regulations create a process for development and approval of a TTPTIP that is not authorized by the legislation. There should be a clear process for development and approval of tribal TIPS, including clear review and approval criteria. It appears that Congress mandated DOT and DOI to implement transportation planning which means primary responsibility for undertaking

the planning activities is on the federal agencies and not on the tribes. The draft regulation does not define how the federal agencies will conduct transportation planning in the absence of a tribal 638 contract. The draft regulations should provide more in absence of a trial 638 contract. The draft regulations should provide more clarification on the transition between the prior IRR TIP processes and the new TTPTIP.

22. How will 202(d) (3) (a) 20 ft opening be applied to culverts?
 - a. 23 USC Section 202(d) authorizes a tribal bridge program. The eligibility criteria do not address multiple box and pipe culverts. What are the eligibility requirements for multiple box and pipe culverts?

23. How will 202(f) be implemented and administrative responsibility for compliance?
 - a. 23 USC 202(f) makes it mandatory for the Secretary of Transportation to determine that the obligation of TTP funds for a Federal Aid project is supplementary to and not in lieu of the obligation of a fair and equitable share of funds apportioned to the State under section 104 before approving that project on a tribal transportation facility. The draft regulation does not address this statutory requirement. What policies and procedures will be developed to carry out this requirement?



Salt River PIMA-MARICOPA INDIAN COMMUNITY

10005 EAST OSBORN ROAD / SCOTTSDALE, ARIZONA 85256-9722
PHONE (480)850-8160 FAX (480)850-7283

June 13, 2013

Tribal Consultations and Informational Meeting Comments
U.S. Department of the Interior
Bureau of Indian Affairs
Office of Indian Services
Mail Stop 4513 MIB
Washington, DC 20240
Email: draft.25cfr170consult@bia.gov

Re: Salt River Pima-Maricopa Indian Community's Comments to
25 CFR 170 Draft Regulations

To Whom It May Concern:

The Salt River Pima-Maricopa Indian Community ("Community") is respectfully submitting comments during the public comment period for the Tribal Transportation Program, 25 CFR 170 draft regulations. The Community's comments to specific regulatory sections are below:

1. Section 170.141 page 19

Clarify how the safety set-aside funds will be allocated to tribal governments. Will it be a competitive process or pro rata distribution similar to the transportation planning funds (Section 170.203)? Tribes need certainty and this issue must be addressed.

2. Section 170.166 (b) (6) and (7) page 27

Clarify the composition of the "advisory committee" mentioned in these sections. Is the "advisory committee" the same entity as the "technical panel" referred to in 170.170 and 171?

3. Appendix A to Subpart B, B.10. page 32

What is meant by a "predefined" stage of construction? The Community is not familiar with this concept. The Community recommends removing the word "predefined."

4. Section 170.200 (a) (2) page 37

Provide guidance on how the tribal transportation facility bridge set-aside funding will be allocated to tribal governments, such as through competitive requirements or pro rata distribution. Also provide guidance on eligibility criteria for this funding.

5. Section 170.5 TTIP definition page 8
Section 170.421 (a) page 47

Provide consistent direction for which projects can be placed on the TTIP. The definition of TTIP on page 8 states that the list comes from "the tribal priority list or the LRTP." However, this is inconsistent with Section 170.421 which only mentions the LRTP and not the tribal priority list.

6. Section 170.443 page 52

Correct the paragraph numbering system throughout this section.

The Community is in support of the provisions in b(1) and (2). The Community agrees that a purpose of the LRTP, according to Section 170.414, is to "justify the tribe's updates to the NTTFI."

The Community recommends removing b(3). Typically funding sources are not identified for proposed projects planned for the 20 year horizon. It is more reasonable to identify a funding source when projects are placed on the TTPTIP and are within a 4 year timeframe. The Community believes that the LRTP itself should be sufficient justification to "justify the tribe's updates to the NTTFI."

The Community also recommends removing (d). A public involvement process is already required as part of the LRTP under Section 170.413.

The Community also recommends removing (e). It is premature for tribal governments to provide expensive and time consuming cost estimates, environmental assessments, and feasibility studies so early in the process. As standard practice, this information is not available until after the pre-project planning stage (see Section 170.415) which is conducted before final project approval on the TTPTIP.

The Community recommends removing (f). Again, assigning maintenance responsibility and having agreements, which are often multi-jurisdictional, completed so early in the process is not feasible or appropriate.

7. Section 170.445 (c) page 53

Clarify what "facility's data information" should be included in the strip map table.

8. Section 170.446 page 53-54

In subsection (a) a., a LRTP “signature sheet” is required. This requirement is inconsistent with Section 170.411 that lists the information that is required in the LRTP. In addition, the Community does not know what is meant by the phrase “signature sheet”.

The information in subsection (f)’s incidental cost verification is helpful to the process, but should not be required as a minimum attachment since incidental costs are no longer part of the funding formula. The Community recommends that this information is included in the NTTFI but not as a required attachment.

9. Section 170.451 (c) page 54

The Community recommends removing the word "Limited." It is unnecessary and redundant because the regulations inherently limit what is eligible because only the “direct impacts” of the construction activity are eligible.

10. Section 170.460 (d) and Section 170.461 page 56

It is unclear whether submission to BIA or FHWA is still required when the tribe meets the requirements of Section 170.461. The Community has the capacity and well-established track-record to approve their own PS&E pursuant to its self-governance compact. For the Community, additional submission to BIA or FHWA would be unnecessary, duplicative and time-consuming.

11. Section 170.471 (f) page 58

The Community recommends that the Department amend this language. It is impractical to require that all changes to the TTP PS&E during construction can only be made by the licensed professional engineer of record. Minor field adjustments are typical during construction. It is common for changes to be initiated by the construction managers or inspectors under a construction change directive and then documented by the contractor on the as-built drawings. The Community recommends that approval for changes should come from an authorized representative working on behalf of the approving agency over the project.

12. Appendix C to Subpart D-Cost to Construct page 64-67

There are a few references to the IRR which should be changed to the TTP.

Typically, Rural Local roads feed into Rural Major Collector roads, which feed into Rural Minor Arterials. The Community recommends that the Department amend the language within (e) Class 5 stating that Rural Local roads “collect traffic for arterial type roads.” Generally, it is “collector roads” that serve to collect traffic for arterial roads.

The Community appreciates the opportunity to review and provide comments to the proposed regulations for the Tribal Transportation Program. If you have any questions, please contact Jennifer Jack, the Community's Road Section Manager, at (480) 362-7747 or Jennifer.jack@srpmic-nsn.gov.

Sincerely,

A handwritten signature in blue ink that reads "Diane Enos". The signature is written in a cursive style with a long, sweeping tail on the letter "s".

Diane Enos
President
Salt River Pima-Maricopa Indian Community



Tonto Apache Tribe

Tonto Apache Reservation #30
Payson, Arizona 85541
Telephone: (928) 474-5000
Fax: (928) 474-9125

June 5, 2013

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

Re: Tonto Apache Tribe's Comments on the "Draft Proposed 25 CFR Part 170" Document

Mr. Gishi,

Last month Mr. Jim Leubner, the Tonto Apache Tribe's Roads/Transportation Coordinator, attended two Tribal Consultation meetings in Phoenix on May 14th and 15th to review the Draft Proposed 25 CFR Part 170 Document. The Tribal Representatives in attendance also reviewed the following documents: 23 USC § 201; 23 USC § 202; and 23 USC § 101.

The Tonto Apache Tribe has the following comments and/or recommendations (in *Italics and/or Bold*) which were derived from the Consultation meetings on May 14th and 15th.

- I. 23 USC § 201. Federal lands and tribal transportation programs – **No Comments**
- II. 23 USC § 202. Tribal transportation program
 - a. 202 a (10) - Competitive Bidding (A) (i)
 1. **Comment** – *Explain how the competitive bidding process will be implemented*
- III. 23 USC § 101. Definitions and declaration of policy – **No Comments**
- IV. Draft Proposed Regulations, 25 CFR 170
 - a. Section 170.226 (b) & (c)
 1. **Comments-**
 - i. *Recommend that the definition of "owned" be clarified to: 1) a meaning of having acquired title or right-of-way; or 2) substitute "owned" for "Public Authority" as defined in 23 USC 101 (a) (20); or 3) define "owned" as operated or maintained roads. Clarify the definition and purpose of the word "owned" and describe the Tribal Impact*
 - ii. *On Page 41, identify the top sentence as item h.*
 - b. Section 170.157
 1. **Comments –**
 - i. *What is the "Authority" to have this committee?*
 - ii. *Recommend that they decide issues by a simple or super majority vote to ensure a prompt and timely response from the BIA/FHWA.*

- iii. *How effective can the Committee be with only having two meetings per year? Recommend that the TTPCC meet at least quarterly.*
 - iv. *Create a process or mechanism to escalate issues for a decision from the TTPCC.*
 - v. *Recommend giving more support for Regional Representatives to coordinate with Tribes.*
- c. Section 170.443
- 1. **Comment –**
 - i. Delete (b) 1-3 and place a period after (LRTP), and delete sections (d, e, and f).
- d. Section 170.444
- **General Comment -** *Include a section in the “TTP Inventory” on coding or the elements needed to provide Tribes access to their own Tribal Inventory without using a Security Clearance*
 - 1. **Comments –**
 - i. *Provide a usable format like “PDF” for tribes to access data.*
 - ii. *Under Section 2 (ii) – Add formal levels of notification by Certified Letter to Tribes*
- e. Section 170.445
- 1. **Comment**
 - i. *Section 170.445 (c) - Explain or Clarify what is included for “Data”.*
- f. Section 170.446
- 1. **Comment**
 - i. *Section 170.446 (g) - Clarify this section as there may be some confusion between Public Authority and Ownership.*
- g. Section 170.451
- 1. **Comment**
 - i. *Section 170.451 (c) – Define or delete “Limited”*
- h. Sections 170.454 and 170.470
- 1. **Comment**
 - i. *Sections 170.454 (b) and Section 170.470 (b) – Explain whether Tribal proposed design standards require a formal BIA or FHWA approval*
- i. Section 170.462
- 1. **Comment**
 - i. *Why was this Section Eliminated?*

If there are any questions please contact Jim Leubner at (928) 474-5000 ext. 8127

Sincerely,



Louise Lopez, TAT Chairwoman

Cc: Jeri DeCola