



2013 Mid-Year Convention Airway Heights, Washington

RESOLUTION #13 - 53

“TRIBAL COMMENT TO PROPOSED REVISIONS TO THE REGULATIONS GOVERNING TRIBAL TRANSPORTATION PROGRAMS”

PREAMBLE

We the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties, Executive Orders, and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise to promote the welfare of the Indian people, do hereby establish and submit the following resolution:

WHEREAS, the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific tribal concerns; and

WHEREAS, ATNI is a regional organization comprised of American Indians/Alaska Natives and tribes in the states of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of the ATNI; and

WHEREAS, on July 6, 2012, Moving Ahead for Progress in the 21st Century Act (MAP-21) was signed into law, and, on April 12, 2013, the Bureau of Indian Affairs (BIA) published a

notice of Tribal Consultation on draft revisions to the regulations governing the Tribal Transportation Program (TTP), which are set forth in 25 C.F.R. Part 170; and

WHEREAS, the draft revisions include changes to almost every section of the Part 170 regulations and would, in a manner not justified by MAP-21, substantively change many regulations directly related to tribal administration of tribal transportation programs and federal oversight and administration, which were developed through an extensive negotiated rulemaking process and directly implicate tribal self-government and tribal trust resources; and

WHEREAS, it is imperative that Indian tribes be afforded the opportunity to participate in a meaningful and collaborative process in the revision of regulations established through a negotiated rulemaking process; and

WHEREAS, the revision of these regulations must be conducted in compliance with the Department of the Interior's (DOI's) tribal consultation and collaboration responsibilities under Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), the existing Part 170 regulations and the tribal consultation plans of DOI and the Department of Transportation; and

WHEREAS, the proposed tribal consultation process, which only provides for three regional meetings and the opportunity to submit comments prior to the publication of a Proposed Notice of Rulemaking fails to satisfy the consultation standards and principles set out in the Executive Order and 25 C.F.R. § 170.103, and the Departments should consider providing either a negotiated rulemaking process or some other collaborative consultation process that offers tribes the opportunity to develop a consensus rule or an interim rule; and

WHEREAS, certain draft revisions would restrict tribal flexibility and interfere with the ability of tribes to administer their own transportation programs in accordance with the principles of self-government do not conform to the statutory mandate to make all funds for Tribal Transportation Program activities available, at the request of a tribal government, in accordance with the Indian Self-Determination and Education Assistance Act (ISDEAA); and

WHEREAS, the Departments should refrain from making any change to the Part 170 regulations that alters the terms established pursuant to negotiated rulemaking unless it is required by statutory modification by MAP-21; and

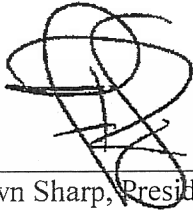
WHEREAS, the Departments should, among other things, consider revisions to: (1) address longstanding obstacles to implementation of agreements under Title I and Title IV of ISDEAA; (2) establish regulations consistent with the above principles to guide implementation of the BIA Program Agreements; (3) establish a process to ensure that tribal transportation funds are distributed in accordance with the statutory deadline; (4) ensure that development of the National Tribal Transportation Facility Inventory is governed by a uniform BIA policy applicable to all regional offices; and (5) ensure that the Departments properly consult, collaborate, and coordinate with tribal governments when developing new or amended regulations or policies and template ISDEAA or Program Agreements; now

THEREFORE BE IT RESOLVED, that ATNI does hereby request that the BIA and Federal Highway Administration (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; and

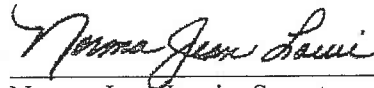
BE IT FURTHER RESOLVED, if the Departments are not willing to use a negotiated rulemaking process, at the bare minimum, the tribal consultation process should not only offer tribes the opportunity to provide comments to draft revisions, it should ensure that the BIA and FHWA will make all tribal comments available to tribes and provide a written response to those comments before publishing a Notice of Proposed Rulemaking.

CERTIFICATION

The foregoing resolution was adopted at the 2013 Mid-Year Convention of the Affiliated Tribes of Northwest Indians, held at Northern Quest Resort Casino, Airway Heights, Washington on May 13-16, 2013 with a quorum present.



Fawn Sharp, President



Norma Jean Louie, Secretary

**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 [INSERT NAMES OF TRIBES], 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) further develop the draft rules. This summary identifies specific sections of the draft regulations that require additional development or rewriting.

I. The Rulemaking and Consultation Process

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

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

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

Under the process described in the BIA notice, tribes have the opportunity to review a significantly revised version of the Part 170 regulations, attend one of three regional meetings, and submit comments on the draft revisions. The notice indicates that the BIA may schedule further consultations at different or additional locations after the Notice of Proposed Rulemaking is published. The tribal consultation process described in the April 12 notice and that will govern this Part 170 revision not only contrasts markedly with the consultation and collaboration offered by negotiated rulemaking, but it also falls far short of 13 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

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

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

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.

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

II. Substantive Issues

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

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

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

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

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

Tribes have successfully used their authority under the ISDEAA and the FHWA Program Agreements entered into in accordance with the ISDEAA, to build capacity and more efficiently address their transportation needs. The accomplishments made are consistent with the existing regulation in Section 170.103, which sets forth the goals and principles that must guide development of the revised regulations. Of particular note, subsection (b) directs the Secretaries to promote the rights of tribes to govern their internal affairs, and subsections (f) and (g) require the Secretaries to encourage flexibility and innovation in the implementation of the program and to reduce, streamline, and eliminate unnecessarily restrictive policies, guidelines, and procedures. Further, when formulating and implementing policies that have tribal implications, Executive Order 13175 requires agencies to (i) encourage tribes to develop their own policies to achieve program objectives; (ii) where possible, defer to tribes to establish standards; and (iii) consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards to preserve the prerogatives and authority of tribes. Absent good cause, the revised Part 170 regulations should, therefore, continue to

promote the ability of tribes to govern the administration of their transportation programs without federal interference, develop alternative tribal policies and standards, and encourage flexibility and innovation.

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

- The draft regulations would establish a new BIA and FHWA authority to review and monitor the performance of all TTP activities, conduct formal review of tribal transportation programs, and require tribes to submit, within 60 days, a corrective action plan for BIA or FHWA approval (see §§ 170.702 – 170.704). These new sections would significantly expand the authority of the federal agencies to monitor tribal programs beyond that permitted under ISDEAA and would conflict with the authority of tribes to govern their program under and in accordance with ISDEAA. Any sections describing such federal authority should be explicitly subject to, and restricted by, the ISDEAA and the ISDEAA regulations.
- As drafted, the new regulations would establish a new FHWA approval process that will delay and interfere with the existing authority of tribes to develop and use alternative tribal design standards. Under the current regulations, tribes are expressly permitted to incorporate the use of alternative tribal design standards in their ISDEAA agreements. Section 170.454 and Appendix B to Subpart D have been revised to remove this authority and require tribes to seek separate FHWA approval for alternative standards. This change, which would directly interfere and conflict with ISDEAA and is not supported by statutory changes in MAP-21, should be stricken and the regulations should reflect the continued authority of tribes to include alternative design standards in their ISDEAA and program agreements. Similar concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (*see* § 170.450 and Appendix A to Subpart D) (this regulation and appendix should also be amended to reflect the new categorical exclusions for projects under \$5 million); and the assumption of TTP functions (*see* § 170.610).
- 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, prior to the deadline, the BIA should be required to provide the Tribe written notice describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

Eligible Uses of TTP Funds

MAP-21 sets forth the allowable uses of TTP funds in 23 U.S.C. § 202(a)(1). The proposed revised regulations, however, fail to reflect this statute. In particular Section 170.115 and Appendix A to Subpart B set out the eligible activities without citing to or restating the eligible uses set forth in Title 23. We request that § 170.115 be revised to include, in addition to the existing provisions, a new subsection that restates the allowable uses set forth in § 202(a)(1), which include certain specific activities, operation and maintenance of transit program and facilities that are located on, or provide access to, tribal land, or are administered by a tribal government, and any transportation project eligible for assistance under this title that is located within, or that provides access to, tribal land, or is associated with a tribal government. It is also important that Appendix A to Subpart B be modified to use the correct defined terms to ensure that the appendix is consistent with the eligible statutory uses of TTP funds. Generally, this appendix has been revised to replace the term “IRR roads” with “tribal transportation facilities” or the undefined term “TTP transit facilities.” To be consistent with the statute we request this appendix use the term “*transportation facilities in the TTP system.*” Similar attention to the definitions is required in a number of sections of the revised regulations to ensure consistency with the eligible uses of funds in the statute.

National Tribal Transportation Facility Inventory (NTTFI)

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

development of the NTTFI be governed by a uniform BIA policy applicable to all regional offices with effective appeal processes that facilitate consistent application of that uniform policy.

Consultation, Collaboration, Coordination

Section 170.101 sets out a number of activities that trigger a requirement for consultation, collaboration, and coordination among tribe, federal, state, and local governments. We recommend that this list be amended to expressly include the following additional activities: (i) developing new or amended regulations or policies that affect the administration of programs or statutory provisions that affect the tribes or tribal transportation programs; (ii) developing template ISDEAA or Program Agreements; and (iii) accepting cooperation of states and local governments and crediting of any funds received from a state, county, or local subdivision for a tribal program in accordance with 23 U.S.C. § 202(a)(9). This last item should set out how such funds will be credited to a tribe and the process for a state, county, or local subdivision to provide funds through this process. Tribes may also consider requesting that paragraph (5), which addresses the development of environmental mitigation measures to protect Indian lands and the environment, be amended to include a reference to tribal cultural resources.

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

III. Conclusion

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

Respectfully,

Tribal Chair

cc: [INSERT NAMES OF TRIBES]

Respectfully,

Rick Galloway, Transportation Planner
CAMAS Go-On



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June 14, 2013

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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:

The Colville Confederated Tribes (“Tribes”) 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 to highlight the considerations regarding the rulemaking and consultation process. This discussion is followed by a summary of key areas for consideration if the BIA and Federal Highway Administration (FHWA) further develop the draft rules. This summary identifies specific sections of the draft regulations that require additional development or rewriting.

As a preliminary matter, the Tribes believes that it is an inefficient use of time and resources to proceed with the proposed rule making. MAP-21 was enacted in the face of Federal Highway Trust Fund and other fiscal constraints. In light of these fiscal circumstances, MAP-21 received only a two-year authorization period. Given these limitations, we question the Agencies' devotion of limited federal transportation resources to this regulatory revision, particularly with respect to any change of the Part 170 regulations that alters the terms established pursuant to negotiated rulemaking unless it is required by statutory modification by MAP-21. As discussed below, if the Agencies insist on proceeding with the rule making, the Tribe has several substantive and procedural recommendations.

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 ("Department") tribal consultation and collaboration responsibilities under Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"), the IRR program regulations (25 C.F.R. Part 170), and the Departments' tribal consultation plans. Section 5 of Executive Order No. 13175 obligates the Departments to explore consensual mechanisms for developing regulations, including negotiated rulemaking, if the revisions relate to tribal self-government and tribal trust resources. The implementation of the MAP-21 Tribal Transportation Program (TTP) regulations relate directly to tribal governments' authority and capability to construct, maintain and operate safe and reliable transportation facilities serving their members and their lands and resources. The delivery of transportation infrastructure is undisputedly an essential governmental function that has vital impact upon the health, safety, and economic well-being of tribal communities that triggers the Department's obligations under Executive Order 13175.

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

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

Under the process described in the BIA notice, tribes have the opportunity to review a significantly revised version of the Part 170 regulations, attend one of three regional meetings, and submit comments on the draft revisions. The notice indicates that the BIA may schedule further consultations at different or additional locations after the Notice of Proposed Rulemaking is published. The tribal consultation process described in the April 12 notice 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 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

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

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

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.

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 the Secretary to provide tribal transportation program funding for the tribal government to carry out Tribal Transportation Program (TTP) (formerly IRR programs), programs, services, functions, or activities (PFSAs) under the ISDEAA. Congress specifically explained its intent to clarify the applicability of the ISDEAA to the IRR Program in SAFETEA-LU. In the Joint Explanatory Statement of the Committee on Conference (H.R. 3, Section 112), the Committee stated as to its authorization and requirement for ISDEAA contracts and agreements that:

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

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

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

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

- The draft regulations would establish a new BIA and FHWA authority to review and monitor the performance of all TTP activities, conduct formal review of tribal transportation programs, and require tribes to submit, within 60 days, a corrective action plan for BIA or FHWA approval (see §§ 170.702 – 170.704). These new sections would significantly expand the authority of the federal agencies to monitor tribal programs beyond that permitted under ISDEAA and would conflict with the authority of tribes to govern their program under and in accordance with ISDEAA. Any sections describing such federal authority should be explicitly subject to, and restricted by, the ISDEAA and the ISDEAA regulations.
- As drafted, the new regulations would establish a new FHWA approval process that will delay and interfere with the existing authority of tribes to develop and use alternative tribal design standards. Under the current regulations, tribes are expressly permitted to incorporate the use of alternative tribal design standards in their ISDEAA agreements. Section 170.454 and Appendix B to Subpart D have been revised to remove this authority and require tribes to seek separate FHWA approval for alternative standards. This change, which would directly interfere and conflict with ISDEAA and is not supported by statutory changes in MAP-21, should be stricken and the regulations should reflect the continued authority of tribes to include alternative design standards in their ISDEAA and program agreements. Similar concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (*see* § 170.450 and Appendix A to Subpart D) (this regulation and appendix should also be amended to reflect the new categorical exclusions for projects under \$5 million); and the assumption of TTP functions (*see* § 170.610).
- 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 include provisions 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. Accordingly, 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, prior to the deadline, the BIA should be required to provide the Tribe written notice describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

Eligible Uses of TTP Funds

MAP-21 sets forth the allowable uses of TTP funds in 23 U.S.C. § 202(a)(1). However, the proposed revised regulations 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 in 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'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-way grant failure to comply with any term or condition of the grant. See 25 C.F.R. § 169.20. If a grantee does not correct the deficiency within a 30-day notice period, the Secretary is directed to terminate. Although these maintenance requirements already exist, tribes do not have a mechanism to seek their enforcement. We, therefore, recommend that the revised regulations provide a regulatory process by which tribes may request a BIA or FHWA review of maintenance on roads owned by another public authority. Further, if maintenance on a non-tribal or BIA-owned transportation facility is found to be deficient, we recommend that the revised regulations direct the Secretaries to notify the road owner of the deficiencies and take steps to enforce applicable maintenance requirements in accordance with 23 U.S.C .§ 116 or the applicable right-of-way agreement.

III. Conclusion

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

Sincerely,



John E. Sirois, Chairman
Colville Business Council



The Confederated Tribes of the Grand Ronde Community of Oregon

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June 13, 2013

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

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

Dear Messrs. Gishi and Sparrow:

On behalf of the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde" or "Tribe"), 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 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, 2013, 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, 2013, 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.

We 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.¹

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.

¹ 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:

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(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.

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- 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).
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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.

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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.

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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

Messrs. Gishi and Sparrow

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Page 9

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-of-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.

Very truly yours,



Mark Johnston
General Manager

cc: Tribal Council
Tribal Attorney



Tribal Transportation Professional Services

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June 14, 2013

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, MS-4513 MIB

Washington, DC 20240

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Re: Comments on the Draft Revisions to the Indian Reservation Roads Program Regulations, 25 CFR Part 170

Dear Mssrs. Gishi and Sparrow:

On behalf of the Klamath Tribes of Oregon, 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) 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 CFR 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 CFR Part 170) and the Departments' tribal consultation plans, Section 5 of Executive Order No. 13175 obligates the Departments to explore consensual mechanisms for developing regulations, including negotiated rulemaking, if the revisions relate to tribal self-government and Tribal trust resources. The implementation of the MAP-21 Tribal Transportation Program (TTP) regulations relate directly to tribal governments' authority and capability to construct, maintain and operate safe and reliable transportation facilities serving their members and their lands and resources. The delivery of transportation infrastructure is undisputedly an essential governmental function that has vital impact upon the health, safety and economic well-being of tribal communities that triggers the Department's obligations under Executive Order 13175.

When undertaking transportation activities affecting tribes, the 25 CFR Part 170 regulations provide that Department Secretaries should, to *the maximum extent permitted by law*, establish regular and meaningful consultation and collaboration with affected local 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 CFR § 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 25 CFR Part 170 regulations, published on April 12, 2013, indicates that 25 CFR 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 25 CFR 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 25 CFR Part 170 revision not only contrasts markedly with the consultation and collaboration offered by negotiated rulemaking, but it also falls far short of 13 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

Although the April 12 notice asserts that it is necessary to revise the 25 CFR Part 170 regulations, it provides no indication that the BIA and FHWA explored or even considered the use of negotiated rulemaking to revise the 25 CFR Part 170 regulations, and the notice articulates no basis for declining to use such a process to revise the 25 CFR Part 170 regulations. As currently set forth, the process described in the April 12 notice fails to meet the standards established in Executive Order 13175.

While we understand that MAP-21 effectively overrides the existing 25 CFR Part 170 Relative Need Distribution Formula, MAP-21 establishes a new formula that leaves little, if any, room for regulatory interpretation, and neither the formula changes nor the name changes require a rushed regulatory process that offers such a limited opportunity for tribal input. Indeed, the 25 CFR Part 170 revisions will also need to consider regulatory updates to address statutory changes from the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

authorization of 2005 that have been retained in MAP-21. Following the SAFETEA-LU authorization, the Agencies engaged with tribes in a preliminary process to develop proposed revisions to 25 CFR Part 170. Although draft revisions were developed, the Departments never felt compelled to present that collaborative draft for tribal consultation notice, nor proceed with a Notice of Proposed Rulemaking (NPRM).

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

MAP-21 was enacted in the face of Federal Highway Trust Fund and other fiscal constraints. In light of these fiscal circumstances, MAP-21 received only a two-year authorization period. Given these limitations, we question the Agencies' devotion of limited federal transportation resources to this regulatory revision, particularly with respect to any change of the 25 CFR Part 170 regulations that alters the terms established pursuant to negotiated rulemaking unless it is required by statutory modification by MAP-21.

II. Substantive Issues

Below are our comments regarding substantive issues and concerns raised by the draft revised 25 CFR 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 USC 202(b)(6)(A). The authorization extends to the Secretary of Transportation pursuant to 23 USC 202(b)(7)(A). In MAP-21, as in SAFETEA-LU (and, with respect to the Secretary of Interior, in the Transportation Equity Act for the 21st Century {TEA-21}), Congress left the Agencies no discretion to deny the request of a tribal government to enter into a contract or agreement for the Secretary to provide tribal transportation program funding for the tribal government to carry out Tribal Transportation Program (TIP) (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,

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with respect to the Secretary of Interior, consistent with TEA-21). Yet, the BIA and FHWA draft 25 CFR Part 170 regulations contain numerous provisions that fail to conform to the express congressional mandate set forth in the statute.

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

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

- The draft regulations would establish a new BIA and FHWA authority to review and monitor the performance of all TTP activities, conduct formal review of tribal transportation programs, and require tribes to submit, within 60 days, a corrective action plan for BIA or FHWA approval (see §§ 170.702 – 170.704). These new sections would significantly expand the authority of the federal agencies to monitor tribal programs beyond that permitted under ISDEAA and would conflict with the authority of tribes to govern their program under and in accordance with ISDEAA. Any sections describing such federal authority should be explicitly subject to, and restricted by, the ISDEAA and the ISDEAA regulations.
- As drafted, the new regulations would establish a new FHWA approval process that will delay and interfere with the existing authority of tribes to develop and use alternative tribal design standards. Under the current regulations, tribes are expressly permitted to incorporate the use of alternative tribal design standards in their ISDEAA agreements. Section 170.454 and Appendix B to Subpart D have been revised to remove this authority and require tribes to seek separate FHWA approval for alternative standards. This change, which would directly interfere and conflict with ISDEAA and is not supported by statutory changes in MAP-21, should be stricken and the regulations should reflect the continued authority of tribes to include alternative design standards in their ISDEAA and program agreements. Similar concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (see § 170.450 and Appendix A to Subpart D) (this regulation and appendix should also be amended to reflect the new categorical exclusions for projects under \$5 million); and the assumption of TTP functions

(see § 170.610).

- 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, prior to the deadline, the BIA should be required to provide the Tribe written notice describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

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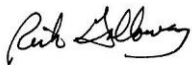
In addition, the draft revised regulations omit sections of the existing regulations that address the maintenance standards and the BIA's obligations to notify the Transportation Department and the owners of transportation facilities if it determines that an IRR transportation facility is not being properly maintained due to insufficient funding. See 25 C.F.R. § 170.811. Because non-BIA and non-tribal roads will no longer generate funding under the new formula in MAP-21, it is increasingly important that states and local governments maintain their transportation facilities, which are located on tribal lands or provide access to tribal communities. If such roads were constructed with Federal-aid Highway funds, 25 U.S.C § 116 mandates their maintenance, and if the facility is not properly maintained, that section directs the Transportation Secretary to contact the state or other direct recipient. Further, if the maintenance deficiency is not corrected within 90 days, the Secretary is directed to withhold approval of further projects until it is resolved. Additionally, standard rights-of-way on tribal lands generally require the grantee to maintain the right-of-way, unless the tribe has agreed otherwise, and the Interior Secretary is authorized to terminate the right-way-way grant failure to comply with any term or condition of the grant. See 25 C.F.R. § 169.20. If a grantee does not

correct the deficiency within a 30-day notice period, the Secretary is directed to terminate. Although these maintenance requirements already exist, tribes do not have a mechanism to seek their enforcement. We, therefore, recommend that the revised regulations provide a regulatory process by which tribes may request a BIA or FHWA review of maintenance on roads owned by another public authority. Further, if maintenance on a non-tribal or BIA-owned transportation facility is found to be deficient, we recommend that the revised regulations direct the Secretaries to notify the road owner of the deficiencies and take steps to enforce applicable maintenance requirements in accordance with 23 U.S.C .§ 116 or the applicable right-of-way agreement.

III. Conclusion

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

Respectfully,



Rick Galloway, Transportation Planner
CAMAS Go-On



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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June 12, 2013

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

The Nez Perce Tribe respectfully submits 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) further develop the draft rules. This

summary identifies specific sections of the draft regulations that require additional development or rewriting.

I. The Rulemaking and Consultation Process

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

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

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

Under the process described in the BIA notice, tribes have the opportunity to review a significantly revised version of the Part 170 regulations, attend one of three regional meetings, and submit comments on the draft revisions. The notice indicates that the BIA may schedule further consultations at different or additional locations after the Notice of Proposed Rulemaking is published. The tribal consultation process described in the April 12 notice and that will govern this Part 170 revision not only contrasts markedly with the consultation and collaboration offered by negotiated rulemaking, but it also falls far short of 13 consultation meetings the BIA and FHWA used to seek tribal input to a proposed policy change regarding the implementation of just one aspect of the previous regulatory formula in 2012.

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

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

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.

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

II. Substantive Issues

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

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

In MAP-21, Congress has authorized that, upon the request of a tribal government, "*all* funds made available through the Secretary of the Interior under this chapter and section 125(e) for tribal transportation facilities . . . *shall* be made available . . . in accordance with the Indian Self-

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

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

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

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

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

- The draft regulations would establish a new BIA and FHWA authority to review and monitor the performance of all TTP activities, conduct formal review of tribal transportation programs, and require tribes to submit, within 60 days, a corrective action plan for BIA or FHWA approval (see §§ 170.702 – 170.704). These new sections would significantly expand the authority of the federal agencies to monitor tribal programs beyond that permitted under ISDEAA and would conflict with the authority of tribes to govern their program under and in accordance with ISDEAA. Any sections describing such federal authority should be explicitly subject to, and restricted by, the ISDEAA and the ISDEAA regulations.
- As drafted, the new regulations would establish a new FHWA approval process that will delay and interfere with the existing authority of tribes to develop and use alternative tribal design standards. Under the current regulations, tribes are expressly permitted to incorporate the use of alternative tribal design standards in their ISDEAA agreements. Section 170.454 and Appendix B to Subpart D have been revised to remove this authority and require tribes to seek separate FHWA approval for alternative standards. This change, which would directly interfere and conflict with ISDEAA and is not supported by statutory changes in MAP-21, should be stricken and the regulations should reflect the continued authority of tribes to include alternative design standards in their ISDEAA and program agreements. Similar concerns arise with the removal of citations to ISDEAA regulations in environmental and archeological requirements (*see* § 170.450 and Appendix A to Subpart D) (this regulation and appendix should also be amended to reflect the new categorical exclusions for projects under \$5 million); and the assumption of TTP functions (*see* § 170.610).
- 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, prior to the deadline, the BIA should be required to provide the Tribe written notice describing the specific cause of the delay and the date for the transfer of funds. Further, the regulation should explicitly state that such notice shall not affect the right of any tribe to take legal action to enforce their agreement or compel payment. If the BIA does not transfer the funds within the new noticed deadline, we

recommend that the BIA be required to send another similar notice describing the specific cause of the delay and the date for the transfer of funds.

Eligible Uses of TTP Funds

MAP-21 sets forth the allowable uses of TTP funds in 23 U.S.C. § 202(a)(1). The proposed revised regulations, however, fail to reflect this statute. In particular Section 170.115 and Appendix A to Subpart B set out the eligible activities without citing to or restating the eligible uses set forth in Title 23. We request that § 170.115 be revised to include, in addition to the existing provisions, a new subsection that restates the allowable uses set forth in § 202(a)(1), which include certain specific activities, operation and maintenance of transit program and facilities that are located on, or provide access to, tribal land, or are administered by a tribal government, and any transportation project eligible for assistance under this title that is located within, or that provides access to, tribal land, or is associated with a tribal government. It is also important that Appendix A to Subpart B be modified to use the correct defined terms to ensure that the appendix is consistent with the eligible statutory uses of TTP funds. Generally, this appendix has been revised to replace the term “IRR roads” with “tribal transportation facilities” or the undefined term “TTP transit facilities.” To be consistent with the statute we request this appendix use the term “***transportation facilities in the TTP system.***” Similar attention to the definitions is required in a number of sections of the revised regulations to ensure consistency with the eligible uses of funds in the statute.

National Tribal Transportation Facility Inventory (NTTFI)

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

Consultation, Collaboration, Coordination

Section 170.101 sets out a number of activities that trigger a requirement for consultation, collaboration, and coordination among tribe, federal, state, and local governments. We recommend that this list be amended to expressly include the following additional activities: (i) developing new or amended regulations or policies that affect the administration of programs or statutory provisions that affect the tribes or tribal transportation programs; (ii) developing template ISDEAA or Program Agreements; and (iii) accepting cooperation of states and local governments and crediting of any funds received from a state, county, or local subdivision for a tribal program in accordance with 23 U.S.C. § 202(a)(9). This last item should set out how such funds will be credited to a tribe and the process for a state, county, or local subdivision to provide funds through this process. Tribes may also consider requesting that paragraph (5), which addresses the development of environmental mitigation measures to protect Indian lands and the environment, be amended to include a reference to tribal cultural resources.

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'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-way grant failure to comply with any term or condition of the grant. See 25 C.F.R. § 169.20. If a grantee does not correct the deficiency within a 30-day notice period, the Secretary is directed to terminate. Although these maintenance requirements already exist, tribes do not have a mechanism to seek their enforcement. We, therefore, recommend that the revised regulations provide a regulatory process by which tribes may request a BIA or FHWA review of maintenance on roads owned by another public authority. Further, if maintenance on a non-tribal

or BIA-owned transportation facility is found to be deficient, we recommend that the revised regulations direct the Secretaries to notify the road owner of the deficiencies and take steps to enforce applicable maintenance requirements in accordance with 23 U.S.C .§ 116 or the applicable right-of-way agreement.

III. Conclusion

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

Respectfully,

A handwritten signature in black ink, appearing to read 'Silas C. Whitman', with a long horizontal flourish extending to the left.

Silas C. Whitman, Chairman
Nez Perce Tribe Executive Committee



UPPER SKAGIT INDIAN TRIBE

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June 12, 2013

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

Subject: Consultation regarding Draft Regulations Governing the Tribal
Transportation Program 25 CFR Part 170

Dear Mr. Gishi:

Thank you for this opportunity to submit comments on the Draft Regulations Governing the Tribal Transportation Program.

Current Consultation Process

The notice in the Federal Register for this consultation did not list a docket for this consultation. Will one be established? If not, how will the comments and the responses from the Bureau of Indian Affairs Division of Transportation (BIADOT) and the Federal Highway Administration (FHWA) be made available and when?

Only three consultations and information sessions were scheduled over an eight day period between the 14th and 21st of May. Previous consultations regarding the Indian Reservation Roads (IRR) program were held at many more locations and over a longer period of time. BIADOT and FHWA did not ensure that all tribes had access to the information provided at these sessions. None of the three consultations were made available via webcast nor have the presentation materials been made publicly available.

Past Consultations and Access to Edits

On June 5, 2012 and July 19, 2012 this Tribe submitted letters providing consultation comments regarding "Implementation of Question 10 of 25 CFR Part 170, Subpart C, Indian Reservation Roads" also on September 29, 2010 consultation comments were submitted in a Tribal letter regarding the same program. To date no acknowledgment or response has been received from the BIADOT or the FHWA with regard to these consultation comments. The Tribe is not aware of the existence of dockets being established for these prior consultations or how to access them if they exist. Where can the formal response from the BIADOT or the FHWA with regard to these previous consultations be found? A summary of the comments previously submitted and the

response from BIADOT and FHWA would enlighten and inform the review of the draft edits of 25 CFR 170 and certainly make this ongoing process more transparent.

A 'redline' version of the draft revisions and an accompanying 'crosswalk' (document comparing the current legislation to the proposed) has not been provided by the FHWA or BIADOT. Not having access to this information hinders the ability of Tribes to provide meaningful consultation comments to the BIADOT and FHWA. A redline of 25 CFR 170 certainly already exists within your organizations as well as explanatory notes as to why the edits have been recommended. This information must be made available to Tribes in a timely fashion in order for a meaningful consultation to take place.

High Priority Projects Program

Funding:

The new highway transportation bill Moving Ahead for Progress in the 21st Century (MAP-21) eliminated the High Priority Projects (HPP) program included in the Tribal Transportation Allocation Methodology of 25 C.F.R. Part 170; HPP program funding was provided by the Highway Trust Fund. This grant program has been replaced with the new Tribal High Priority Project (THPP) Program (Section 1123). A significant change in the new HPP program is the source of funding. Section 170.1002 of the Federal Register states: What funding is available for THPPP? Subsection (a) states that "The THPPP is authorized at \$30,000,000 for each of fiscal years 2013 and 2014. The funds to carry out the program are to be made available from the **general fund of the Treasury.**" (**Emphasis added**).

No funds were made available from the general fund of the Treasury for this program in 2013 and given the impacts of the ongoing sequester the funding of this program in 2014 and in subsequent years is also in doubt. According to the USA Today (March 4, 2013) "under current law, the sequestration is scheduled to last almost nine years, through FY 2021."

The loss of these funds will significantly reduce the ability of Tribes to design and construct their priority transportation projects. THPP Program funding is restricted not only to transportation projects in general but to "the highest priority project of the Indian tribe" or for funding "an emergency or disaster with respect to a transportation facility included on the national inventory of tribal transportation facilities."

The Upper Skagit Indian Tribe has been the recipient of two HPP grants since 2001 totaling \$1,615,000. The first grant allowed the Tribe to partner with the local County on a \$2.8 million dollar project to reconstruct 1.4 miles of road on which there had been 2 fatal accidents and 12 injury accidents in the three years prior to the completion of the project.

Our second HPP grant was for \$615,000 for the development of plans and specifications and right-of-way acquisition for approximately 0.5 miles of road. The work funded by this grant is still in progress. However, when budgeting this project the Tribe had anticipated

receiving the additional \$385,000 in construction funds (for the maximum \$1 million in HPP funds) to complete the project. Although this Tribe has chosen to set aside a portion of its shares for several years in an effort to accumulate sufficient funds to construct this second HPP project; accumulating an additional \$385,000 will delay the construction of this project and idle transportation construction dollars. Forcing tribes such as ours to idle funds in this manner is bad policy and a poor use of tribal transportation program dollars. The absence of an active THPPP grant program hinders the construction of projects essential to the safety, economic development and service delivery of tribes.

It should be noted that from 1975 - 2002 the number of fatal motor vehicle crashes that occurred on roads within Indian Reservations increased by 52.5%, compared with a 2.2% decrease in auto fatalities in the rest of the nation ("Fatal Motor Vehicle Crashes on Indian Reservations: 1975-2002" National Highway Traffic Safety Administration, National Technical Information Service. April 2004). Transportation safety is a national priority and the HPP/THPPP grant program has been and should continue to be an essential tool in meeting that objective.

It should also be noted that the design, permitting and right-of-way acquisition for projects has become increasingly complex and costly making grant assistance for PS&E a priority. Without a fully funded THPPP the ability of this Tribe to fund 'shovel ready' projects will be severely limited.

Since the THPPP specifically targets transportation projects will the THPPP funds continue to maintain a separate identity from the TTP formula funding distributed to Tribes? Will funding continue to be provided by the general fund of the treasury instead of the Highway Trust Fund? We strongly urge appropriations for the program be made for FY2014 and that future regulatory changes establish once again a specific set aside source for the program.

Project Scoring and Selection

The TTP High Priority Scoring Matrix is provided in Appendix A to Subpart I. This scoring matrix was taken directly from the matrix used for the previous HPP grant program. Although the MAP-21 legislation does provide the ranking criteria for this program it does not provide scoring guidance or definitions. The Tribe believes that this scoring matrix is not balanced and does not acknowledge prior funding commitments that have or will be made by the program. Also, the rubric or scoring guide to be used for this matrix needs to be provided along with the definitions for terms such as 'geographic isolation' and 'other fund sources'. The suggested edits to the scoring matrix are shown below as well as explanatory comments.

TPP High Priority Project Scoring Matrix						
Notes (see below)	Score	10	5	3	1	0
	Accident and Fatality rate for candidate route (see note 1)	Severe	X	Moderate	Minimal	No Accidents
	Years since last TTP or IRR construction project completed	Never	Last project more than 10 years ago	Last Project 5-9 years ago	Last projects within 1 to 4 years	Currently has project
A	Readiness to Proceed to Construction or TTPBP Design Need	PS&E complete and approved	Bridge Replacement PS&E development project	Bridge rehabilitation PS&E development project X	Non-Bridge PS&E development project X	X
B	Funding source for completed PS&E development project	THPPP grant (or previous IRR HPP grant)	X	Tribal Funds (TTP or other Tribal Funds)	Non-THPPP, TTP or Tribal Funding.	X
C	Percentage of projects matched by other fund sources.	X	80 percent or more by other funds	20-79 percent by other funds	1-19 percent by other funds	No other funds
D	Amount of funds requested (see note 2)	X	\$250,000 or less X	\$250,000 to \$500,000 or less	\$501,000 to \$750,000 More than \$500,000	Over \$750,000 X
E	Geographic Isolation	No external access to community	Substandard primary access to community	Substandard secondary access to community	Substandard access to tribal facility	X
E	Access Road for Tribal Community.	x	Only access for community	Substandard primary access to community	Substandard access to Tribal facility/Lands for Tribal Development	x
	All weather access for: - Employment - Commerce - Health - Safety - Educational resources - Housing	Addresses all 6 elements	Addresses 4 or 5 elements	Addresses 3 elements	Addresses 2 elements	Addresses 1 element
1 National Highway Traffic Safety Board Standards						
2 Total funds requested, including preliminary design, construction, and construction engineering						

A. Readiness to Proceed to Construction or TTPBP Design Need:

Scoring should be changed to reduce preferences given to bridge replacement or rehabilitation PS&E. Previously the IRR program did not provide/allow funding for bridge PS&E and the high priority project (HPP) program was one of the few sources of funding available for bridge design. However that restriction no longer exists and this should be reflected in the scoring matrix for the TTP High Priority Projects Program. Also the TTP now includes a statutory set-aside for tribal transportation facility bridges to assist with this necessary work. Therefore, bridge and non-bridge PSE projects should be placed on an equal footing as shown in the suggested funding matrix edits (10 points for 'shovel ready' and 5 points for every other PS&E development project).

B. Funding source for completed PS&E development project (New Scoring Category)

If the THPPP program funds a PS&E development project this should be viewed as a commitment to the project construction as well as design. This should be recognized in the funding matrix with a strong scoring component. As mentioned above, the design, permitting and right-of-way acquisition for projects has become increasingly complex and costly especially for larger projects making grant assistance for PS&E a priority. Also the ability to fund these projects once they are 'shovel ready' is essential for tribes in particular whose interests are less likely to align with other local or regional projects.

C. Percentage of projects matched by other fund sources:

Define 'other fund sources' to include all non-THPPP tribal funding including TTP shares. Our Tribe has been setting aside a percentage of its tribal transportation program (TTP) funding over several years in order to fund larger capital construction projects. Unless the scoring matrix definitions allow TTP funds to be viewed as 'other fund sources' it will penalize our Tribe for making this sacrifice. If other funding is to be included in the scoring matrix it must reward tribes for the contribution of their precious TTP funds. It is bad policy to force tribes to idle monies for an extended period of time saving up for a project rather than putting them to use. Penalizing tribes for this planning effort; by reducing their THPPP scores will contribute to an outcome which is contrary to overall program goals and objectives. Also, it should not be assumed by the TTP that tribal priorities must be in agreement with or captive to state/local priorities and/or politics.

D. Amount of funds requested:

Significantly reduce the points assigned to this ranking criteria. The maximum award for this program is \$1,000,000 including preliminary design, construction, and construction engineering. If the program has already determined that one million dollars is the maximum award then why assign points based on funding level? It should also be noted that this maximum funding level has remained constant since the HPP program began. Inflation since SAFETEA-LU was passed in 2005 has reduced the maximum award by nearly 20%. It is also true that there are many factors that affect the funding necessary to construct or reconstruct a length of roadway such as the regional/local cost to construct (CTC), the presence of wetlands, streams or bodies of water, the presence of endangered species, terrain, local road standards, average daily traffic, etc. These costs are certainly not equal across Indian Country. Therefore assigning points based on amount of funds requested when there is already a maximum award restriction in place has almost no relation to the actual need for or benefit provided by the project.

E. Geographic Isolation:

No definition for ‘geographic isolation’ was provided in the draft proposed 25 CFR 170 nor was one provided in the MAP-21 legislation. Therefore it can only be assumed that it will be interpreted as it was under the former HPP grant program. Under the previous HPP grant program out Tribal staff was told that full points for this funding category would only be given to tribes accessible only by plane or boat. This is a situation that is far more common in Alaska than for any other Region. A scoring category that so heavily favors tribes in one region is not appropriate for a competitive grant program intended for all of Indian Country. If a region finds that its transportation funding needs cannot be met even with the much more widely distributed TTP funds; this is not the appropriate means to obtain them. Since the legislation requires consideration of geographic isolation in the ranking criteria then it must be defined as broadly as possible to represent the challenges of geographic isolation of tribes in all regions.

Perhaps this could be replaced with:

Access Road to Tribal Community or Property

A scoring category that recognizes the importance of a single or primary access route (including a road from an airstrip or harbor) for a tribe may be important to include in the scoring matrix in lieu of geographic isolation. Fewer points could be awarded for providing a new access road for isolated properties scheduled for development.

Inventory Data Revision Appeals

The rewrite of 170.231 entirely precludes tribal appeals to BIA or FHWA of the data relied upon by the agencies to calculate “tribal shares” under the TTP, 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” RNDF and PAF data, or the revised MAP-21 funding factor data for the TTP.

The NTTI would be developed through the entry of data by the BIA Regional offices, as is the existing IRR inventory. For a number of years, tribes have expressed concern that the BIA Regional offices and the BIADOT have been applying different processes and standards for determining what facilities may be included on the inventory. For example at the BIA IRR consultation held in Spokane Washington on June 7, 2012 Mr. Sparrow, the Indian Reservation Roads manager at the Federal Highway Administration explained that 15,000 miles of proposed roads had been added to the national inventory. Mr. Sparrow said that this represented 9% of the Inventory which was receiving 100 percent funding per mile. Also, it was explained that some Tribes were allowed to include in their inventories all roads within a 5 mile radius of their reservations. Prior to this consultation our Tribe was not aware of these practices. The clear implication was that the majority of these roads had been added to increase the funding for specific tribes. The development of the NTTFI must be governed by a uniform BIA policy applicable to all regional offices as well as the BIADOT office responsible for the NTTFI. This uniform policy must have an effective appeal process that facilitates the consistent application of that uniform policy.

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.

The elimination of the data revision appeal process also assumes that the tribal inventories used for the MAP-21 funding calculations will not be reopened, this is unrealistic. The inventory will need to be reopened in the future in order to capture the normal changes in the NTTFI that affect funding calculations. In fact during this consultation process tribes were told “Although the FY12 inventory is used in the formula calculation, inventory updates from the Tribes are encouraged to continue.” The implication is that the inventory will be reopened in the future to capture those changes that affect funding calculations or project boundaries. It is essential to have an appeal process in place to accompany these inventory edits.

Deadlines for Inventory Updates:

There are annual deadlines for the submittal of inventory changes in §170.444 that apply to tribes and the regional offices. The proposed revisions to 25 CFR 170 eliminate those deadlines. As outlined in the attached Tribal consultation letter dated June 5, 2012 (heading ‘Inventory Edits’ on page 3 of 4) the lack of established deadlines for BIADOT to review data and get it back to the Regional Offices such that the region and the tribe have a timeframe to re-submit corrections in the fiscal year submitted has repeatedly caused difficulties for our Tribe. These deadlines need to be retained and expanded to include BIADOT. Without a clear, organized process for inventory edits our experience has shown that the accuracy of the NTTFI will not be maintained and the calculation of tribal shares based on that inventory will become inaccurate.

Maintenance of Cost to Construct (CTC)

The CTC should be used as an important planning tool both for Tribes as well as the BIADOT and the FHWA. The CTC in conjunction with an accurate National Tribal Transportation Facility Inventory (NTTFI) allows governmental organizations to quantify the overall transportation funding needs in Indian Country. There should be a requirement for BIADOT to regularly maintain the CTC for each and all of the regions.

Also a revision should be made to the definition of percent of grade and drain costs required to include a reference to pervious pavements and bioretention which allow the capture and infiltration of stormwater as close to its origin as possible. These and other Low Impact Development (LID) or Green Stormwater Infrastructure (GSI) technology are increasingly being used to protect streams, rivers, lakes and other waters of the United States (See EPA's Strategic Agenda to Protect Waters through Green Infrastructure <http://epa.gov/greeninfrastructure>). These techniques will be increasingly used in Indian Country to manage stormwater and protect the environment.

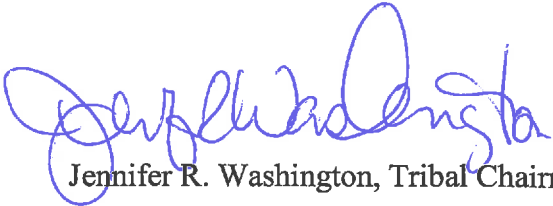
Additional Objections to Draft Changes:

The Tribe is in agreement with the expressed concerns and objections as stated in the attached tribal discussion point document (Tribal Discussion Points by Law Offices Sonosky, Chambers, Sachse, Endreson & Perry, LLP) with the exception of point 8 regarding cost to construct tables which is addressed separately in this letter as well as the attached draft "COMMENTS ON 25 CFR PART 170 REGULATIONS" prepared by Hobbs, Straus, Dean & Walker, LLP.

Conclusion:

The USIT appreciates your consideration of our 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. Because Indian Country is very diverse, flexibility in the TTP program is essential and the trust obligation the BIA has to all tribes must be taken into account.

Sincerely,



Jennifer R. Washington, Tribal Chairman

cc: Robert W. Sparrow Jr., Director, Tribal Transportation Program, FHWA
Michael S. Black, Director Bureau of Indian Affairs
Kevin K. Washburn, Assistant Secretary of the Interior for Indian Affairs
Senator Maria Cantwell
Senator, Patty Murray
Rick Galloway, IRRPCC Northwest Region
Stanley M. Speaks, NWRO