

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****25 CFR Part 170**

[Docket No. FHWA-2002-12229]

RIN 1076-AE17

Indian Reservation Roads Program**AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This proposed rule would establish policies and procedures governing the Indian Reservation Roads (IRR) Program. It expands transportation activities available to tribes and tribal organizations and provides guidance to tribes and tribal organizations for planning, designing, constructing, and maintaining transportation facilities. BIA also proposes a Tribal Transportation Allocation Methodology that includes a Relative Need Distribution Factor for allocating IRR Program funds based on the relative needs of Indian tribes, and reservation or tribal communities, for transportation assistance; and the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation, and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.

DATES: Written comments are due on or before October 7, 2002. For dates of public information and education meetings, please see Supplementary Information.

ADDRESSES: Mail or hand deliver written comments to the docket number appearing at the top of this document to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590-0001 or submit electronically at <http://dms.dot.gov/submit>. All comments should include the docket number appearing in the heading of this document. In addition, as part of the Department's ongoing effort to reduce paperwork burdens, the Department invites the general public to take this opportunity to comment to OMB on the information collections contained in this proposed rulemaking, as required by the Paperwork Reduction Act. Such comments should be sent to the following address: Attention—Desk Officer for the Interior Department, Office of Information and Regulatory

Affairs, Office of Management and Budget, 725 27th Street, NW., Washington, DC 20503. Please send a copy of these paperwork burdens comments to the Dockets Management Facility as noted above. All comments received will be available for examination and copying at the Dockets Management Facility between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard, or you may print the acknowledgement page that appears after submitting comments electronically. For locations of public information meetings see the Supplementary Information section.

FOR FURTHER INFORMATION CONTACT:

LeRoy Gishi, Chief, Division of Transportation, Bureau of Indian Affairs, 1849 C Street, NW., MS 4058 MIB, Washington, DC 20240, (202) 208-4359 between 8 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Electronic Access**

Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help. An electronic copy of this document may be downloaded using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at: http://www.archives.gov/federal_register and the Government Printing Office's web site at: <http://www.access.gpo.gov/nara>.

I. Background*What Information Does This Section Address?*

This section addresses:

- Public information and education meetings the Department will hold during the comment period;
- The Transportation Equity Act for the 21st Century (TEA-21), Public Law (Pub. L.) 105-178;
- The IRR Program;
- How the Secretary formed the TEA-21 Negotiated Rulemaking Committee (the Committee), who its members are, how the Committee operated, when the Committee met, and the Committee's process for developing the rule and the Tribal Transportation

Allocation Methodology for distributing IRR Program funds; —How funding for the IRR Program is currently distributed under the existing relative need formula; and —Issues on which Federal and tribal negotiators were unable to agree.

What Public Information Meetings Are Scheduled To Explain This Rule?

We will hold a series of 12 public information and education meetings within the comment period for this notice of proposed rulemaking (NPRM) to explain the content of the NPRM, answer questions, and encourage written public comment. The meetings will be held at the locations listed below. Individuals wishing information, may contact the individual listed under the caption **FOR FURTHER INFORMATION CONTACT**.

The purpose of the public information and education meetings is to present the proposed rule and the proposed funding methodology. They are not public hearings. The meetings will include brief presentations by members of the TEA-21 Negotiated Rulemaking Committee on the content of the NPRM and the Tribal Transportation Allocation Methodology, including the Relative Need Distribution Factor for distributing IRR Program funds, and a period for clarifying questions. Attendees wishing to express comments on the content of the proposed rule should direct those comments to the address listed under the caption **ADDRESSES**.

The meeting sites and dates are:

Location	Dates
Minneapolis, Minnesota.	September 25, 2002.
Nashville, Tennessee Rapid City, South Dakota.	September 27, 2002. August 20, 2002.
Billings, Montana	August 22, 2002.
Las Vegas, Nevada ..	August 27, 2002.
Sacramento, California.	August 29, 2002.
Gallup, New Mexico Santa Fe, New Mexico.	September 4, 2002. September 6, 2002.
Anchorage, Alaska ...	September 10, 2002.
Portland, Oregon	September 12, 2002.
Tulsa, Oklahoma	September 17, 2002.
Oklahoma City, Oklahoma.	September 19, 2002.

How Will the Public Education and Information Meetings Be Conducted?

Each meeting will be conducted by a facilitator with tribal Committee members presenting the proposed rule and the proposed funding methodology. There will be periods for questions and answers. Each meeting will be held from

8 a.m. to 5 p.m., local time. The agenda for the meetings is:

- Agenda for Information and Education Meetings* (all times local)
- 8–8:30 a.m. Introduction (Meeting format)
 - 8:30–8:45 a.m. Overview of the Negotiated Rulemaking Process
 - 8:45–9:15 a.m. Explanation of NPRM—Preamble, Table of Contents, Parts
 - 9:15–9:30 a.m. Break
 - 9:30–12 noon Explanation and Clarification of Published Proposed Rule
 - 12–1 p.m. Lunch Break
 - 1–1:30 p.m. Overview of Tribal Transportation Allocation Methodology (TTAM) (funding)
 - 1:30–3 p.m. Explanation and Clarification of TTAM (funding)
 - 3–3:15 p.m. Break
 - 3:15–5 p.m. (Continued) Explanation and Clarification of TTAM (funding)

What Is the Transportation Equity Act for the 21st Century?

The Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 Stat. 107, signed into law in 1998, is a broad-based statute that authorizes and expands the use of Federal Highway Trust funds through fiscal year 2003. Several provisions of TEA–21 directly affect the Indian Reservation Roads (IRR) program. TEA–21:

- Authorizes \$1.6 billion for the IRR Program for fiscal years 1998–2003;
- Provides for use of the Indian Self-Determination and Education Assistance Act (the ISDEAA), Public Law 93–638, as amended, by tribes to contract IRR projects; and
- Establishes the Indian Reservation Roads Bridge Program (IRRB), codified at 23 U.S.C. 202(d)(c).

A minimum of \$13 million of IRR funds is set aside for a nationwide priority program for improving deficient IRR bridges. On July 19, 1999, the Secretary of Transportation issued an interim final rule for the IRR bridge program, now found at 23 CFR 661.

What Is the Indian Reservation Roads Program?

The Indian Reservation Roads (IRR) Program is a program of eligible transportation projects authorized under 23 U.S.C. 204. The program is jointly administered by BIA and FHWA's Federal Lands Highway Core Business Unit. The duties and responsibilities of BIA and FHWA are described in a Memorandum of Agreement between the two agencies which can be found at the section on joint administration. The IRR Program was established on May 26,

1928, by Pub. L. 520, 25 U.S.C. 318(a). It authorized the Secretary of Agriculture (which had responsibility for Federal roads at that time) to cooperate with state highway agencies and the Department of the Interior to survey, construct, reconstruct, and maintain Indian reservation roads serving Indian lands.

In 1982, under the Surface Transportation Assistance Act of 1982 (STAA), Pub. L. 97–424, Congress created the Federal Lands Highway Program (FLHP). This coordinated program addresses access needs to and within Indian and other Federal lands. The IRR Program is a funding category of this program. STAA expanded the IRR system to include tribally-owned public roads as well as state and county-owned roads.

Each fiscal year FHWA determines the amount of funds available for construction. BIA works with tribal governments and tribal organizations to develop an annual priority program of construction projects which is submitted to FHWA for approval based on available funding. FHWA allocates funds to BIA which distributes them to IRR projects on or near Indian reservations according to the annual approved priority program of projects. BIA distributes funds using the relative need formula. This formula addresses the allocation of funds to reflect the cost to improve roads to an adequate standard, measure the relative importance of road usage, and measure the socio-economic needs to be served by new transportation facilities.

What Is the Purpose of the IRR Program?

The purpose of the IRR Program is to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and communities for Indians and Alaska Natives, visitors, recreational users, resource users, and others, while contributing to economic development, self-determination, and employment of Indians and Alaska Natives. As of October 2000, the IRR system consisted of approximately 25,700 miles of BIA and tribally-owned public roads and 25,600 miles of state, county, and local government public roads.

How Do BIA and FHWA Jointly Administer Statutory Requirements for the IRR Program?

The Federal-Aid Highway Act of 1944, Pub. L. 521, 58 Stat. 838, Section 10(c) required the Public Roads Administration to approve the location, type, and design of all IRR roads and bridges before any expenditures were made and generally supervise all such

construction. In 1946, the predecessor agencies of BIA and FHWA (the Office of Indian Affairs and the Public Roads Administration, then in the Department of Commerce, respectively), entered into their first agreement to jointly administer statutory requirements for the IRR Program. Since that time, there have been other interagency agreements to carry out FHWA and BIA duties and responsibilities under 23 U.S.C. 208.

In 1973, BIA and FHWA entered into an agreement for an "Indian Roads Needs Study"; FHWA was to assist BIA in identifying roads that were at that time, or that should have been, included, as BIA's responsibility. In 1974, BIA and FHWA entered into two separate agreements which set out the joint and individual statutory responsibilities of FHWA and BIA for constructing and improving Indian reservation roads and bridges. The intent of both agreements was to establish a Federal-aid Indian road system consisting of public Indian reservation roads and bridges for which no other Federal-aid funds were available. Both BIA and FHWA jointly designated those roads and, under 23 U.S.C. 208, FHWA was responsible for approving the location, type, and design of IRR and bridge projects and supervising construction of these projects. At that time, IRR projects were authorized under the Federal-Aid Highway Act and under 23 U.S.C. 208, but they were constructed with Department of the Interior appropriations.

In 1979, BIA and FHWA entered into another agreement which explicitly recognized the role of individual tribes in defining overall transportation needs. This agreement provided that the Indian road system was to consist of:

[t]hose Indian reservations roads and bridges which are important to overall public transportation needs of the reservations as recommended by the tribal governing body. These are public roads for which BIA has primary responsibility for maintenance and improvement. Roads included on the Indian Road System shall not be on any Federal-aid system for which financial aid is available under 23 U.S.C. 104. After STAA's enactment, BIA and FHWA entered into a new 1983 Memorandum of Agreement that set forth the respective duties and responsibilities of each agency for the IRR Program. Under the interagency agreement, BIA, working with each tribe, was to develop an annual priority program of construction projects and submit the annual priority program to FHWA for review, concurrence, and

allocation of funds. This 1983 agreement also specifically referenced the Buy Indian Act of June 25, 1910, 36 Stat. 891 (see also 25 U.S.C. 13) in response to 23 U.S.C. 204(e) which provided an exemption, if in the public interest, to the competitive bidding requirements of Title 23 with respect to all funds appropriated for the construction and improvements of IRRs that the Secretary administers. The 1983 interagency agreement also recognized that, although FHWA's assistance and oversight would continue, both FHWA and BIA would be responsible for the implementation and success of the IRR Program. As a result of section 1028 of ISTEA, which provided for the Highway Bridge Replacement and Rehabilitation Program, BIA and FHWA amended their 1983 agreement to provide for their respective responsibilities for that program.

Why Did the Secretary Enter Into Negotiated Rulemaking With Indian Tribal Governments?

TEA-21, Section 1115(b), mandates that the Federal Government (with representatives from the Department of the Interior and the Department of Transportation) enter into negotiated rulemaking with tribal governments to develop IRR Program procedures and a funding formula to allocate IRR funds. This rule was negotiated under the provisions of 5 U.S.C. 561.

What Is the Purpose of the TEA-21 Negotiated Rulemaking Committee?

The purpose of the TEA-21 Negotiated Rulemaking Committee is to negotiate and develop proposed regulations for the IRR Program to implement the applicable portions of TEA-21 and to establish a funding formula for fiscal year 2000 and each subsequent year based on factors that reflect:

- The relative needs of the Indian tribes, and reservations or tribal communities, for transportation assistance; and
- The relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources. (TEA-21, Pub. L. 105-178, Section 1115(b)).

How Did the Secretary of the Interior Inform the Public About the TEA-21 Negotiated Rulemaking Process?

The Secretary published a **Federal Register** "Notice of Public Meeting" on

October 30, 1998 (63 FR 58413). The Secretary held a national informational meeting for tribal governments, tribal organizations, individual tribal members, and the public to share information about the regulatory negotiation process for the IRR Program under TEA-21 on November 16, 1998, in Albuquerque, New Mexico. On December 17, 1998, the Secretary published a **Federal Register** "Notice of Intent to Form a Negotiated Rulemaking Committee and Accept Applications for Membership" (63 FR 69580). On February 11, 1999, the Secretary published a **Federal Register** notice proposing the members of the TEA-21 Negotiated Rulemaking Committee (Committee) (64 FR 6825). The Committee's meeting schedule was published on the IRR web site at <http://www.irr.bia.gov>. BIA produced a periodical newsletter that was published on the web site and was mailed to all primary and alternate Committee representatives. In addition, there were periodic mailings to all tribal leaders of federally recognized tribes. All full Committee and work group meetings were open to the public and the Committee accepted oral and written comments at each meeting. The Committee met in different geographical areas of the United States so that Indian tribes and tribal organizations could participate in the meetings and provide their comments for the record.

How Was the TEA-21 Negotiated Rulemaking Committee Formed?

The Secretary was required by 23 U.S.C. 202, as amended by TEA-21, to develop regulations and establish a funding formula for allocating IRR funds among Indian tribes using a negotiated rulemaking process. Section 202 also required the Secretary to:

- Apply the procedures of negotiated rulemaking under 5 U.S.C. 561 *et seq.* (the Negotiated Rulemaking Act of 1990), in a manner that reflects the unique government-to-government relationship between Indian tribes and the United States; and
- Ensure that the membership of the Committee includes only representatives of the Federal Government (the Department of the Interior and the Department of Transportation) and of geographically diverse small, medium, and large tribes.

In the **Federal Register** notice of December 17, 1998 (63 FR 69580), the Secretary requested nominations for committee representatives from tribes in each of the 12 BIA regions. In addition, the Secretary invited other interested, qualified persons to apply. The Secretary encouraged tribes to nominate

representatives and alternates who were members of geographically diverse direct service, self-determination, and self-governance tribes, as well as members of tribes who had varying levels and types of experience in transportation development and management. Each of the 12 BIA regions were also invited to nominate 2 representatives and 2 alternates to serve on the committee.

After reviewing the nominations, the Secretary appointed 2 primary tribal representatives and 2 alternate tribal representatives from each of the 12 BIA regions. In addition, the Secretary added five additional primary tribal committee representatives from regions that were considered under-represented in order to meet the statutory requirements for adequate representation of small, medium, and large tribes. On February 11, 1999, the Secretary published a **Federal Register** "Notice of the Proposed Membership of the Negotiated Rulemaking Committee" under Section 1115 of TEA-21 (64 FR 6825). After the Secretary received and reviewed comments, the representatives named in the notice were appointed to the Committee.

The Committee membership reflected balanced interests by including: (1) Members of geographically diverse small, medium, and large tribes; (2) members of tribes identified as direct service, self-governance, and self-determination; and (3) members of tribes with experience in many areas of transportation development and management (e.g., jurisdictional issues, complexity of transportation systems, climatic concerns, environmental factors, geographic isolation, *etc.*). The Secretary appointed 10 Federal representatives from the Bureau of Indian Affairs (BIA) (the Department of the Interior) and 3 Federal representatives from the Federal Highway Administration (FHWA) (the Department of Transportation). The Committee has a total of 42 primary representatives—29 primary tribal representatives and 13 primary Federal representatives. The Secretary also appointed two alternates for each of the primary tribal representatives. The Secretary appointed the BIA Regional Director from the Southwest Regional Office as the Designated Federal Official.

How Does the Committee Operate?

The Committee operates under a set of written rules called protocols that the Committee developed. In the protocols, the Committee agreed to procedures for conducting meetings, to dates and locations of meetings, and to operate

based on consensus decision-making. Four tribal representatives and three Federal representatives, chosen by their respective caucuses, chaired the full Committee meetings.

The Committee identified over 117 issues with over 422 questions and answers for consideration. The Committee established four work groups to address identified subject matter areas of the IRR Program. Each work group chose a tribal representative to chair the work group. The work groups considered matters that addressed: (1) Funding formula, (2) policy, (3) delivery of services, and (4) technical standards. Tribal and federal resource persons who were not Committee members also assisted the work groups. The four work groups reviewed and researched issues and, where appropriate, drafted regulations in question and answer form. Each work group made recommendations to the full Committee on whether and how each issue should be addressed in the proposed regulations. Each work group presented its draft questions and answers to the full Committee for approval. The tribal and federal caucuses separately reviewed all proposed questions and answers and each caucus commented to the other on all proposed questions and answers. The full Committee considered the caucuses' comments. If the questions and answers needed further negotiation or consideration, a small group of tribal and federal members met to discuss them and work toward agreement. The small groups then presented their recommendations to the respective caucuses which made their recommendations to the full Committee. When the full Committee agreed on the questions and answers, approval was by consensus. All consensus items which were made a part of the official record are contained in the Committee's Documents 1–15. Consensus items were distributed to all Committee members and posted on the IRR web site for TEA–21.

When Did the TEA–21 Committee Meet?

The TEA–21 Committee held its first meeting March 16–18, 1999, in Albuquerque, New Mexico. The Committee decided that it would meet in various locations across the country to allow tribal representatives and individuals to present comments to the Committee and participate in full Committee and work group discussions. Between March 1999 and the last meeting November 27–December 1, 2000, the full Committee met 23 times at the following locations: Albuquerque, New Mexico; Portland, Oregon; Washington, DC; Sacramento,

California; Anchorage, Alaska; Tulsa, Oklahoma; Ft. Yates, North Dakota; Phoenix, Arizona; Green Bay, Wisconsin; Minneapolis, Minnesota; Denver, Colorado; and San Diego, California. The four committee work groups met separately during full Committee meetings and at different times and locations.

How Will the TEA–21 Committee Handle Written Public Comments?

The Committee will review and consider all comments received within the comment period for this rule. To the extent practicable, the Committee will consider comments received after the comment closing date. It will make recommendations on the comments to the Secretary for the final rule.

How Is the IRR Program Funded?

From the DOT appropriation, FHWA reserves up to 1.5 percent for its administration and oversight of the IRR Program. Together BIA and FHWA develop a plan for using the remaining funds. This plan includes program management funds for BIA (up to 6 percent is authorized in the annual DOI Appropriations Act). Up to 2 percent of IRR Program funds are set aside for transportation planning by tribal governments.

What Is the Existing “Relative Need Formula” (RNF)?

The existing relative need formula is a mathematical calculation based on factors reflecting the cost to improve eligible IRR's, vehicle miles traveled, and population of federally-recognized tribes. As provided for in the 1982 Surface Transportation Assistance Act (STAA), BIA developed and FHWA approved the RNF to provide an acceptable method to compute the relative needs of the various Indian reservations for the distribution of Highway Trust Funds among all federally recognized Indian tribes.

What Is the History of the Existing Relative Need Formula?

On January 6, 1983, the STAA provided Highway Trust Funds for road construction on Indian reservations. Section 126 of the STAA required the Secretary of Transportation to allocate Highway Trust Funds for improvement of Indian Reservation Roads (IRR) according to the relative needs of the various reservations.

In 1983, BIA began a planning process to determine the relative need for roads on the various reservations and to develop transportation plans for Indian reservations. In 1988, BIA undertook a national relative need study. From

January 1988 to May 1989, an independent Indian consulting firm conducted a study under the guidance of BIA. The result of the study was a proposed Relative Need Formula. This proposed Relative Need Formula was made available to all tribes for review and comment over a period of 2 years. A final review of the existing Relative Need Formula was conducted in 1992 and the Deputy Commissioner of Indian Affairs and the FHWA approved the existing relative need funding formula. In January 1993, BIA began implementing the RNF over a 4-year transition period.

What Is the Definition of “Relative Need” With Respect to Indian Reservation Roads?

“Relative Need” is a ranked series of road and bridge improvements (by estimated cost) required to bring the IRR system from its existing condition to an adequate safe standard. When applied to individual Indian reservations it is a ranked series of road improvements (by estimated cost) required to bring roads and bridges that are located within or provide access to an Indian reservation to an adequate safe standard.

Does the Existing Relative Need Formula Need To Be Used To Compute Percentages of Highway Trust Funds for Allocation to Indian Tribes?

The existing Relative Need Formula is used to compute percentages of Highway Trust Funds for allocation to Indian tribes because there is a legislative requirement as follows.

“On October 1 of each fiscal year, the Secretary [of Transportation] shall allocate the sums authorized to be appropriated for such fiscal year for Indian Reservation Roads according to the relative need of the various reservations as jointly identified by the Secretary [of Transportation] and the Secretary of the Interior.” 23 U.S.C. § 202(e).

What Does the Existing Relative Need Formula Look Like?

The following is the final version of the existing Relative Need Formula:

$$A = 0.5 \times (CI \div \text{Total CI}) + 0.3 \times (\text{VMT} \div \text{Total VMT}) + 0.20 \times (\text{POP} \div \text{Total POP})$$

Where:

A = Percent of Relative Need for an individual tribe

CI = Total cost to improve for an individual tribe

VMT = Total vehicle miles traveled for an individual tribe

POP = Total population for an individual tribe

Total CI = Total cost to improve for all tribes

Total VMT = Total vehicle miles traveled for all tribes

Total POP = Total population for all tribes

0.50, 0.30, 0.20 = Coefficients reflecting relative importance given to each formula factor

Example:

Tribe X has:

CI = \$51,583,000

Total CI = \$4,820,399,000

VMT = 45,680

Total VMT = 7,929,653

POP = 4,637

Total POP = 1,183,967

A = 0.00535 + 0.00173 + 0.00078

A = 0.00786 or 0.786 percent

If Construction Funds available for the fiscal year are \$160,000,000

Then: Tribe X distribution would be:

\$160,000,000 × 0.00786 = \$1,257,600

How Is the Cost To Improve (CI) Computed?

The data needed to compute the CI is taken from road inventories performed by tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638) contracts and by BIA. The road inventory includes attributes on individual road standards commonly found on reservations. In addition to the inventory, BIA regions supply cost tables identifying estimated costs for constructing a mile of road, in terms of four key road construction estimating items added to each specified standard, including grade and drain, gravel construction, pavement construction and incidental construction. Several other inventory attributes are then used to approximate the existing condition of the road or section of road in terms of the four key road construction-estimating items. Utilizing the cost per mile estimate tables submitted by BIA Regions, the cost for improving an existing road, or section of road, from its existing condition to its identified adequate road standard is computed. Once all of the computations are made for all roads or road sections needing improvement within each reservation, all costs are added up. BIA then uses the results in the Relative Need Formula.

How Is the VMT Acquired?

The road inventory data base includes existing average daily traffic (ADT) and/or projected 20-year ADT for each road or section of road which is eligible and designated for improvement. The length of road, or section of road, is also included in the inventory data base. The vehicle miles traveled (VMT) for each

road, or section of road, to be improved is then computed by multiplying the 20-year projected ADT by the length of road or section of road. The VMTs for each road or section of road are then added up and the totals used in the Relative Need Formula.

How Is the Population Data Acquired?

BIA currently acquires the population data for each reservation from the Indian Service Population and Labor Force Estimates published by the U.S. Department of the Interior, Bureau of Indian Affairs.

What Is the Significance of the Coefficients 0.50, 0.30, and 0.20 That Are Used in the Current Relative Need Formula?

The coefficients used in the formula reflect the relative importance given to each factor. The size of the coefficient is justified on the following grounds:

- Cost to improve is the most important factor and is the primary basis for determining Relative Need. It is given the weight of 0.50 (50 percent).
- Benefits received from a road improvement are generally measured in terms of usage or VMT. This factor is important, but not as significant as cost in determining need. It is given the weight of 0.30 (30 percent).
- Population, in itself, is not an overwhelming indicator of the need for road improvements. It is given a weight of 0.20 (20 percent).

Which Roads Are Included in the Cost To Improve Calculations?

Existing or proposed roads in the BIA system which are considered to have a construction need by Indian tribes are included in the cost to improve calculations. Tribes must adhere to certain guidelines in the selection of those roads. The roads must:

- Be on the Indian Reservation Road system;
- Not belong to or be the responsibility of other governments (i.e., States or counties);
- Be within or provide access to reservations, groups, villages and communities in which the majority of the residents are Indian; and
- Be vital to the economic development of Indian tribes.

These roads are also identified by construction need (CN) in the road inventory which is performed for each reservation. Currently only the roads with a construction need category of 1 and 4 are included in the cost to improve calculations. These are defined as follows:

Construction Need 1 (CN1): Existing roads needing improvement.

Construction Need 4 (CN4): Roads which do not currently exist and need to be constructed (proposed roads).

What Is the Construction Need of Completed Road Improvements?

Roads or sections of roads which have been improved to their acceptable standard(s) are classified in the road inventory as construction need of 3 (CN3) roads or construction need of 0 (CN0) roads. CN3 roads or sections of roads are roads for which no further improvements are planned. Roads or sections of roads which have been improved to their acceptable standard but future improvements are anticipated, should be classified as CN0 until further improvements are needed due to deterioration based on age or increased traffic volumes. While classified as CN3 or CN0, roads are not included in the cost to improve calculations.

Why Is it Important To Have a Road Inventory That Is Accurate and Current?

Much of the data needed to compute the cost to improve and the VMT comes from the road inventory. If the data from the inventory is not accurate and current the true Relative Need for each tribe cannot be computed accurately. The inventory should be updated anytime a road is improved or added to the inventory. The inventory should also be updated periodically because deterioration of roads may occur and the cost to improve to the acceptable standard then increases. This would also indicate the true Relative Need.

What Is Being Done To Assure That the Data Used in the Relative Need Formula Is Uniform, Accurate, and Consistent?

The nationwide road inventory system, including all reservations, is continuously updated. This inventory is used to determine the relative condition of the road system for each reservation. The data is also used to compute the relative "cost to improve" roads on each reservation to an adequate safe standard. The cost to improve data is used together with the road usage (VMT) and Indian Population data to determine the latest "Relative Need" of each reservation. The new inventory is updated when a road is improved, when a new road is added to the inventory or when a road deteriorates to the point when it needs to be improved.

What Is the Proposed Method of Distributing IRR Program Construction Funds?

The Tribal Caucus of the TEA-21 Negotiated Rulemaking Committee developed the Tribal Transportation

Allocation Methodology (TTAM) as a consensus compromise.

1. TTAM distributes IRR Program construction funds as follows:

- *2% Transportation Planning Funds.*

It continues to provide for 2% Transportation Planning Funds.

TTAM introduces 2 new concepts:

- *IRR High Priority Project Program (IRRHPP).* It creates a national funding pool for IRRHPP using 5% of IRR Program construction funds.

This pool will be available on an application basis for tribal projects needed for emergencies or disasters, or for tribes whose funding allocation under the formula is insufficient to build their highest priority project. IRRHPP projects must be IRR eligible and may not exceed \$1 million. If Congress increases appropriations for the IRR Program above the current level of \$275 million, 12.5% of the increase, after takedowns, will be added to the IRRHPP funding pool; and

- *Population Adjustment Factor (PAF) allocation.* If Congress increases appropriations for the IRR Program above the current level of \$275 million, 12.5% of the increase, after takedowns, will be used for a new small minimum allocation, PAF, for all tribes based on population ranges. PAF addresses the relative administrative capacities of tribes by taking into account the fact that all tribes participating in the IRR program necessarily incur some costs. As a practical matter, any participating tribe must undertake activities such as inventory development, planning, inter-governmental coordination, and maintaining management systems. The PAF component ensures that all tribes have a small but meaningful amount of funds for these activities. By delaying the PAF until there are appropriations increases, the TTAM minimizes the negative impact on large tribes.

2. TTAM establishes a Relative Need Distribution Factor:

- *The Relative Need Distribution Factor.* The remainder of IRR Program construction funds (after 2% for Transportation Planning and 5% for IRRHPP) will be allocated by the following formula:

50% Cost-to-Construct (CTC) + 30% Vehicle Miles Traveled (VMT) + 20% Population (POP).

These are the same formula factors and the same percentage allocations as under the existing BIA Relative Need Formula, but some changes have been made in the definitions and data used for each. TTAM includes technical improvements in the way the Relative Need Distribution Factor data is collected, applied, and administered

which will make it easier for all tribes to participate in the IRR Program.

How Is Cost-to-Construct (CTC) Calculated in the Relative Need Distribution Factor?

The largest component of the TTAM (50%) is CTC, a factor which measures the need for construction funds for tribally-identified projects and, thus, the relative need of tribes for transportation assistance. CTC in TTAM will be derived from an expanded inventory that will include all IRR-eligible transportation projects. TTAM provides guidelines for future improvements in the cost methodology for the Relative Need Distribution Factor. Until this revised method is completed, the Relative Need Distribution Factor uses the "Simplified Approach to Cost to Construct" in Appendix C to Subpart C. By expanding the inventory for funding purposes to include all IRR-eligible projects, the Relative Need Distribution Factor of TTAM will result in a more complete accounting of tribal transportation needs. It will also ensure that IRR Program funding is spent on projects that generate funding in the Relative Need Distribution Factor, and thereby remove completed projects from the funding system. In contrast, under the existing Relative Need Formula, cost to improve funding was generated only by BIA system routes, but could be expended on other IRR-eligible projects.

How Is the Vehicle Miles Traveled (VMT) calculated in the Relative Need Distribution Factor?

VMT (30%) is a factor measuring transportation facility usage and includes the need to maintain and improve the existing transportation infrastructure. The Relative Need Distribution Factor uses the same methodology for computing VMT as the existing relative need formula, except that it is computed from current Average Daily Traffic (ADT) counts rather than the projected 20-year ADT.

How Is Population (POP) Calculated in the Relative Need Distribution Factor?

POP (20%) is a factor that is one indicator of transportation needs. The data used for population will be the tribal service population taken from the BIA Labor Force Report, until such time as the Native American Housing Assistance and Self-Determination Act ("NAHASDA") American Indian and Alaska Native service population data is adjusted to include 2000 Federal census data. At that time, the NAHASDA service population will be used. The NAHASDA service population is developed by the Department of

Housing and Urban Development pursuant to the Native American Housing Assistance and Self-Determination Act.

Why Did the Tribal Caucus Develop TTAM?

The Tribal Caucus developed TTAM to reflect Congress's intent expressed in TEA-21 that the funding distribution method balance the interests of all tribes and enable all tribes to participate in the IRR Program. Other guiding principles the Tribal Caucus used to develop the TTAM were:

- Avoiding major percentage reductions of funds from particular tribes;
- Allowing tribes to identify their true transportation needs;
- Correcting technical problems with the existing Relative Need Formula; and
- Devising a system that is accurate, verifiable, and uniformly applied.

The overall effect of the TTAM is to make it easier for small tribes to participate in the program, without making major reallocations of funds from larger tribes.

Why Did the Tribal Caucus Change the Existing Relative Need Formula to the Relative Need Distribution Factor?

The BIA's prior relative need formula was criticized by smaller and historically underserved tribes for allocating funds primarily from an inventory of roads BIA built in the past and still owns. By driving funding primarily from an inventory of BIA system roads, the existing RNF tended to direct funds to tribes according to their past participation in the program, leaving many tribes out. Further, tribes that generate a small share under the formula have had difficulty accessing any construction funds at all, since a road construction project typically costs more than a small tribe's entire allocation under the formula. On the other hand, many other tribes believe BIA's existing relative need formula serves their needs and requires only technical improvements to ensure that it is accurately and uniformly applied.

How Is the IRR Inventory Used in the Relative Need Distribution Factor?

The inventory used in the Relative Need Distribution Factor will be expanded to include tribally-owned public roads and other IRR-eligible transportation facilities identified by tribes to more accurately measure transportation assistance needs and to match the projects on which IRR Program funding is spent. Other improvements will be made in the way

the formula components are calculated and applied.

What Are Other Features of the New Relative Need Distribution Factor?

- It bases the inventory used for funding purposes on the needs of tribes as identified through long-range transportation planning.
- It allows the inclusion of all IRR-eligible facilities in the inventory, but gives greater weight to BIA and tribally-owned public facilities by limiting, for Relative Need Distribution Factor purposes, most other IRR-eligible facilities to the amount of local matching funds needed for the project.
- It provides that construction cost data be derived from an average of local tribal costs, state cost data from the tribe's area, and national tribal cost averages.

How Does the Relative Need Distribution Factor Meet the Needs of Small, Medium, and Large Tribes?

The Relative Need Distribution Factor will broaden tribal participation in the IRR Program. By expanding the inventory to include all IRR-eligible projects, the Relative Need Distribution Factor will benefit all tribes by allowing all of their actual IRR transportation needs to be counted for funding purposes. The Relative Need Distribution Factor improves the accuracy and uniformity of the data by using state and national average construction cost data in addition to self-reported costs. Various other improvements are made in the management and processing of the data.

How Does the Relative Need Distribution Factor Comply With Congressional Intent?

TEA-21, at 23 U.S.C. 202(d)(2)(D), required that the funding distribution method be based on factors that reflect:

- The relative needs of the Indian tribes, and reservation or tribal communities, for transportation assistance; and
- The relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.

Relative Need of Indian Tribes for Transportation Assistance. The Relative Need Distribution Factor and inventory system address the relative need of all tribes for transportation assistance by setting up a tribally-driven process for developing and maintaining the

inventory data from which funding is calculated. It provides for a full accounting of tribal transportation needs. In the existing relative need formula cost to improve funding was generated only by BIA system routes, but all IRR roads designated as construction need 1 (CN1) and 4 (CN4) compute a need based on VMT. The Relative Need Distribution Factor continues the practice of the existing formula using Population and VMT factors to allocate funds based on road use and population.

Relative Administrative Capacities of Indian Tribes. The Relative Need Distribution Factor recognizes that all tribes participating in the IRR Program necessarily incur some costs, such as the cost of planning, developing the inventory, and interacting with other government agencies. For this reason, 12.5% of future funding increases will be allocated by the Population Adjustment Factor so that all tribes receive at least some funding. The existing 2% Transportation Planning program is continued. Finally, the interim funding allocations used in FY 2000, 2001, and 2002 provided per tribe allocations to enable tribes to do administrative and planning work necessary to participate in the IRR Program.

Cost of Road Construction. Tribal construction costs will continue to drive 50% of the funding allocation.

Geographic Isolation. The difficulties caused by geographic isolation are addressed in the Cost-to-Construct factor of the Relative Need Distribution Factor because geographic isolation (location) is the biggest variable in determining construction costs. The Relative Need Distribution Factor uses an average of local tribal costs, local state costs, and national average tribal costs in applying the Construction Cost factor, and thus takes into account the geographic differences between the tribes.

Difficulty in Maintaining All-Weather Access. This factor will be addressed by the tribes themselves as they add projects they believe are important to the inventory. It is also addressed in the ranking system for the new IRRHPP program, where projects that address these particular needs score higher.

II. Summary of Regulations

Subpart A—General Provisions and Definitions

This subpart outlines the authority under which this rule is established. The purpose and scope of this rule is defined with respect to 23 U.S.C. 202(d) and 204 and the IRR Program. This

subpart provides interpretation of the language used throughout 23 U.S.C. 202(d) and (204).

The subpart further outlines the policies, guidance manuals, directives, and procedures that will govern the IRR Program under direct service, self-determination contracts, and self-governance agreements. It also includes definitions used throughout the rule.

Subpart B—Indian Reservation Roads Program Policy and Eligibility

This subpart:

- Explains the Federal, tribal, state, and local governments' coordination, collaboration, and consultation responsibilities; and
- How these efforts can effectively assist the tribal governments in meeting their transportation needs.
- Lists activities eligible for IRR funding; and
- Lists activities not eligible for IRR funding.
- Discusses the use of all eligible Indian Reservations Roads; and
- Other transportation facilities eligible for construction, including cultural access roads, housing access roads, toll roads, recreation, tourism, trails, airport access roads, transit facilities, and seasonal transportation routes authorized under 23 U.S.C. 204(j).

• Covers the highway safety aspects of the IRR Program; and

- Those activities, functions, and equipment that may be eligible for funding under this program; and
- The formation of an IRR

Coordinating Committee to make recommendations to help meet program objectives.

- Local Technical Assistance Programs available to BIA and tribes performing activities under the IRR Program.

This subpart also includes:

- Transportation research activities;
- Education and training opportunities available to tribes and BIA through Local Technical Assistance Programs and other federal, state, and local organizations; and
- How IRR Program funds may be used for education and training.

Subpart C—Indian Reservation Roads Program Funding

This subpart covers the Tribal Transportation Allocation Methodology and includes a Relative Need Distribution Factor to distribute IRR Program funds. It includes:

- Allocation of IRR Program Funds (overview);
- 2% Transportation Planning Program;

- Relative Need Distribution Factor for IRR Construction;
- IRR High Priority Projects Program (IRRHPP);
- Population Adjustment Factor (PAF); and
- Relative Need Distribution Factor.

It covers the following factors used in the Relative Need Distribution Factor:

- Cost-to-Construct;
- Vehicle Miles Traveled; and
- Population.

This subpart also includes:

- General Data Appeals;
- IRR Inventory; and
- Long-Range Transportation Planning.

Subpart D—Planning, Design, and Construction of Indian Reservation Roads Program Facilities

This subpart discusses:

- The transportation planning responsibilities and requirements consistent with 23 U.S.C. 134 and 135 and funding for transportation planning;
- The requirements for developing a Transportation Improvement Program and long-range plans; and
- The requirements for public hearings in the development of IRR TIPs.

This subpart also:

- Defines the IRR inventory and transportation classifications;
- Discusses how the IRR Inventory is developed and used;
- Discusses components of the IRR Inventory;
- Includes the environmental and archaeological requirements that apply to projects under this program;
- Covers whether IRR Program funds can be used for these requirements;
- Outlines design, construction, and construction monitoring standards;
- Includes procedures for road, bridge, and intermodal facilities;
- Identifies the roles of and the responsible entities for such activities;
- States the requirements for obtaining rights-of-way for construction of IRR facilities;
- Covers annual and semi-annual program reviews required as a part of the overall management and oversight of the IRR Program; and
- Discusses the processes and procedures used at the various office levels of the IRR Program to insure that the program is being carried under these regulations and the governing laws;
- Outlines the management systems that BIA must develop and maintain under 23 U.S.C. 303 for oversight and management of the IRR Program.

Subpart E—Service Delivery for Indian Reservation Roads

This subpart tells how the ISDEAA can be used:

- To contract for programs under the IRR Program;
- In self-governance agreements;
- In consortium contracts and agreements;
- In multiple-year agreements;
- For rights of first refusal;
- In applicability of advance payments for ISDEAA contracts and agreements;
- For contingency funds; and
- For cost overruns.

It also covers:

- Indian preference versus local preference in contracting;
- Contract enforcement;
- Applicability of the Buy Indian Act and the Buy American Act to the IRR Program;
- Applicability of the Federal Acquisition Regulations and Davis Bacon wage rates with respect to self-determination contracts or self-governance agreements;
- Force account work;
- Waivers of regulations;
- The Federal Tort Claims Act;
- Technical assistance available to tribes planning to contract for IRR Program eligible activities and/or functions; and
- Savings

Subpart F—Program Oversight and Accountability

This subpart discusses:

- Oversight roles and responsibilities for the IRR Program;
- Memoranda of Understanding;
- Professional licensing requirements;
- Requirements for project approvals; and
- Program accountability.

Subpart G—BIA Road Maintenance

This subpart covers:

- BIA Transportation Facility Maintenance Program;
- Eligible activities and facilities for maintenance including roads, bridges, airports, and other eligible facilities;
- Maintenance funding;
- Facility ownership;
- Maintenance responsibilities to the traveling public;
- Maintenance management system requirements;
- Maintenance standards that apply to the maintenance program;
- Mandated bridge inspection requirements and standards; and
- Provisions for emergency maintenance.

Subpart H—Miscellaneous

This subpart provides information to tribal governments on the transport of hazardous and nuclear waste and covers:

- Indian preference and tribal employment rights;
- Applicability of tribal taxes and fees for IRR Projects;
- Emergency relief for declared disasters on or near Indian reservations;
- Funding availability for repairs of eligible facilities;
- Tribal regulation of oversize and overweight vehicles;
- Reporting requirements;
- Welfare-to-work;
- Tribal employment rights;
- Establishing and operating tribal transportation departments and the eligible activities and/or functions for which these organizations can contract;
- Alternative dispute resolution procedures to resolve IRR Program disputes;
- Conflicts in law provisions; and
- Research activities available under the IRR Program.

III. Key Areas of Disagreement

During the negotiated rulemaking the Committee addressed seven general subject matter areas: (1) General provisions, (2) IRR Program policy and eligibility, (3) IRR Program funding, (4) planning, (5) design and construction of IRR Program facilities, (6) IRR Program service delivery, and (7) maintenance and miscellaneous provisions. The Committee broke each area into questions and answers, the vast majority of which were agreed to by the Federal and tribal representatives.

The tribal and Federal representatives did not reach a consensus on several issues. The disagreement items presented below by each side are not meant to be point-by-point rebuttals, rather, they are presentations of each side's views. The Federal and tribal suggestions on language (in question and answer format) for each area of disagreement are presented below, in order, by subpart and section, where appropriate. However, four areas of disagreement—advance funding, savings, contractibility, and availability of contract support funding—are outside the scope of this rulemaking. However, the Committee negotiated on these items and they are therefore presented together at the end of this section on disagreement items. In order to provide a complete proposed rule that could be commented upon, and pursuant to Administrative Procedure Act guidelines, the Federal text on the disagreement items is represented in the body of this proposed rule. Where Federal questions and answers are inserted into the rule, the section numbers are noted in the disagreement items below.

A. General Issues

The Tribal caucus and Federal caucus interpreted differently some statutory requirements about what TEA-21 requires BIA and FHWA to do and permits tribes to do, leading to disagreements on items such as availability of IRR Program funds under the Indian Self-Determination and Education Assistance Act, as amended (the ISDEAA).

Tribal View

As a general matter, the Tribal Caucus and Federal Caucus often disagreed over issues because they interpreted the statutory requirements of TEA-21 differently. For example, in the Tribal Caucus' view, TEA-21 plainly requires that all IRR Program funds be made available in accordance with the requirements of the Indian Self-Determination and Education Assistance Act, as amended (the ISDEAA), to Indian tribes that choose to administer IRR projects or the entire IRR Program. See 23 U.S.C. 202(d)(3). TEA-21 also provides that all funds made available under Title 23 U.S.C. for Indian reservation roads and bridges are subject to the ISDEAA mandates "[n]otwithstanding any other provision of law or any interagency agreement or program guideline, manual or policy directive." *Id.* Many of the disagreement items which follow stem from disagreements about what TEA-21 requires BIA and FHWA to do and permits Indian tribes to do.

To the extent that the IRR regulations differ in any respect from the provisions in the ISDEAA, the Tribal Caucus believes that the IRR regulations should serve to advance—rather than retard—the Federal Government's avowed policy of increasing tribal autonomy and discretion in the operation of this federal Indian program. See Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000) (mandating that executive agencies develop federal policies that "respect Indian tribal self-government and sovereignty" and that "grant Indian tribal governments the maximum discretion possible" with respect to Federal statutes and regulations).

Federal View

The Federal views below reflect the present Federal statutory and regulatory responsibilities of both DOI and DOT in their administration and oversight of the IRR Program.

The Federal Caucus agrees that TEA-21 applies the ISDEAA to all IRR Program funds. However, TEA-21 does

not, as the tribal view states above, require all IRR Program funds to be made available to tribes. Simply stated, the disagreement in statutory interpretation is over whether all IRR Program funds must be transferred to tribes or whether all IRR Program funds are subject to the ISDEAA.

Section 1115(b) of TEA-21 provides:

(A) In General.—Notwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy directive, all funds made available under this title * * * shall be made available, upon request of the Indian tribal government * * * in accordance with the Indian Self-Determination and Education Assistance Act * * *.

(B) Exclusion of Agency Participation.—Funds for programs, functions, services, or activities, or portions thereof, including supportive administrative functions that are otherwise contractible to which subparagraph (A) applies, shall be paid in accordance with subparagraph (A) * * *.

B. Eligibility—Subpart B

The issue is whether BIA or FHWA makes the determination on a new proposed use of IRR Program funds. The Federal text is inserted at § 170.116.

Tribal View

The Tribal Caucus proposes the following regulatory provision to guide Indian tribes in determining whether a proposed use of IRR funds is allowable:

How Can an Indian Tribe Determine Whether a New Proposed Use of IRR Funds Is Allowable?

(a) An Indian tribe that proposes new uses of IRR funds may submit a written inquiry to BIA concerning whether the proposed use is eligible under Titles 23 and 25 of the United States Code, and other applicable provisions of federal law. The requesting Indian tribe must also provide a copy of its inquiry to FHWA.

(b) BIA must provide the requesting Indian tribe, with a response in writing, within 45 days of receipt of the written inquiry. BIA must approve the proposed use unless it can identify a specific statutory prohibition to the proposed use related to transportation. To the extent practicable, BIA will consult with FHWA and the IRR Program Coordinating Committee in addressing the inquiry.

(c) If BIA fails to issue a timely written response to the eligibility inquiry, the proposed use will be deemed to be allowable until guidance has been issued by the Coordinating Committee.

(d) BIA will refer all eligibility decisions to the Coordinating Committee for consideration for guidance updates.

(e) Denials of a proposed use may be appealed by the tribe under 25 CFR part 2.

(f) Nothing in this section shall be interpreted as modifying or diminishing an

Indian tribe's authority to redesign programs and reallocate funds under Public Law 93-638, as amended, and applicable regulations.

When an Indian tribe assumes and performs IRR Program activities under either a self-determination contract or self-governance agreement, its ISDEAA agreement is an intergovernmental agreement and is with BIA, not FHWA. Under 23 U.S.C. 203, the Secretary of the Interior (and, thus, BIA) has express authorization to approve projects. This express statutory authority to approve projects independent of FHWA necessarily carries with it the ability to determine whether a proposed use of funds for a given project is permissible. General policy statements in 49 U.S.C. 101(b) about the need for the DOT does not preempt the specific grant of authority to the Interior Secretary contained in 23 U.S.C. 203. Therefore, the Tribal Caucus believes that tribal inquiries as to whether a proposed use of the IRR Program funding an Indian tribe administers under its ISDEAA agreement with BIA are appropriately directed to BIA and that BIA should be responsible for making the decision in a timely fashion.

The Federal Caucus approach would require the Indian tribe to submit its request to both BIA and FHWA for decision. This could lead to a situation where the agencies might issue inconsistent decisions. The Tribal Caucus believes that the Federal Caucus approach creates more procedural requirements than are necessary, discounts the fact that BIA has statutory authority to independently approve projects, overlooks that these ISDEAA agreements are 'government-to-government' agreements between BIA and the tribe, and is inconsistent with the ISDEAA. Under the Tribal Caucus approach, the inquiry is submitted directly to BIA, with a copy to FHWA, and BIA is the agency responsible for issuing the decision. By making BIA responsible for issuing the decision, instances of inconsistent or contradictory results or decisions by BIA and FHWA are avoided. The Tribal Caucus approach also facilitates the ability of BIA to timely seek input from FHWA by requiring the Indian tribe to provide a copy of its request to FHWA directly. This approach will provide FHWA with the ability to provide BIA with input or guidance, if it so chooses. This approach also recognizes that BIA, as a party to the ISDEAA agreement, is the appropriate entity to respond to such tribal inquiries about the program assumed under such an intergovernmental agreement.

With respect to the applicable standard, the Tribal Caucus believes

that a proposed use of IRR Program funds should be allowable unless the use would violate Congressional statutory dictates. The Tribal Caucus believes that the approach suggested by the Federal Caucus—that a proposed use must be approved if it is listed in Title 23 of the United States Code as an eligible item—rings hollow because the full Committee already took steps to ensure that all eligible items listed in Title 23 are incorporated into the Eligibility listing found in these regulations. The Tribal Caucus believes its approach on this issue is more consistent with the ISDEAA.

With respect to the amount of time for issuing a decision, the Tribal Caucus approach would limit the amount of time BIA has to issue a response to a maximum of 45 days because the building seasons tribes deal with are often extremely short, especially in Alaska and northern and mountainous regions of the United States. The 60 days the Federal Caucus prefers can effectively push tribal projects off until the following year.

Finally, with respect to the impact on redesign and reallocation authority, the Tribal Caucus believes that language should be included to clarify that this provision does not amend such authority which is otherwise available under the ISDEAA. Indian tribes performing IRR Program activities under self-determination contracts and self-governance agreements have some authority to redesign the program and reallocate funding in accordance with 25 U.S.C. 450j(j), 450j-1(o), 458cc(b). The Tribal Caucus recognizes that there are some limitations on this general redesign authority for construction activities. However, not all IRR Program activities are construction activities. Furthermore, no provision federal law requires tribes to obtain the approval of FHWA in advance of reprogramming or reallocating IRR Program funds in a manner which is consistent with the ISDEAA. With this in mind, the Tribal Caucus feels it is imperative to expressly state that the regulatory provision addressing new uses of IRR Program funds does not modify or diminish tribal redesign and reallocation authority which is otherwise available under the ISDEAA. Absent such a qualifying statement, one could incorrectly infer that this regulatory provision modifies such tribal redesign and reallocation authority.

Federal View

New proposed uses of IRR Program funds must be submitted to FHWA for approval for several reasons. Title 23

U.S.C. 204(h)(7) authorizes the Secretary of Transportation to make eligibility determinations for the Federal Lands Highway Program on projects for all funding categories, including the IRR Program. Title 49 U.S.C. 101(b) directs DOT to ensure the coordination and effective administration of the transportation programs of the United States Government. Eligibility determinations and use of funds is a crucial component of the effective administration of transportation programs. The eligibility list and the method for submitting new items for eligibility consideration ensures a consistent approach to national IRR transportation issues. The Federal position regarding eligibility denials provides for an appeal process pursuant to 25 CFR part 2.

The Federal proposal is as follows:

How Can a Tribe Determine Whether a New Proposed Use of IRR Funds Is Allowable?

(a) A tribe that proposes a new use of IRR program funds must submit a written inquiry to BIA and FHWA concerning whether the proposed use is eligible under Titles 23 and 25 of the United States Code and other applicable provisions of Federal law.

(b) For eligibility questions that refer to self-determination and self-governance contracting and road maintenance, BIA must provide a written response to the requesting tribe within 60 days of receipt of the written inquiry. For eligibility questions that refer to IRR Program, FHWA must provide a written response to the requesting tribe within 60 days of receipt of the written inquiry. BIA must approve the proposed use if it is authorized under Title 25 and is related to transportation. FHWA must approve the proposed use if it listed as an eligible item in Title 23. To the extent practicable and before denying the request, BIA or FHWA consults with the IRR Program Coordinating Committee.

(c) If either BIA or FHWA fails to issue the requesting tribe a timely written response to the eligibility inquiry, the proposed use will be deemed to be allowable until a determination has been made and the written response is provided to the tribe.

(d) BIA and FHWA will send copies of all eligibility determinations to the IRR Program Coordinating Committee and BIA regional offices.

(e) Tribes may appeal denials of a proposed use pursuant to 25 CFR part 2.

C. Updating the IRR TIP—Subpart D

The issue is how often the IRR TIP must be updated. The Federal text is inserted at § 170.420.

Tribal View

The Committee developed detailed planning regulations to better ensure the development of a comprehensive transportation program regardless of whether such program is administered by BIA, on behalf of Indian tribes, or is

assumed by a tribe under the ISDEAA. Through better transportation planning, both tribes and BIA should maximize available resources. Only those transportation projects listed on the IRR TIP, however, are eligible for IRR construction funds. The Tribal Caucus therefore believes it is important: (1) That a specific time frame be set out in the IRR regulations governing the frequency with which BIA must update the IRR TIP, and (2) that a specific time frame be added by which BIA must actually complete the IRR TIP update once it has received a revised or amended tribal transportation improvement program (TTIP) or tribal priority list from an Indian tribe.

The Tribal Caucus recommended that the proposed regulation provide that updates to the IRR TIP occur on a quarterly basis, or as otherwise needed, and further proposed that the updating process, once BIA received a tribal request to modify the IRR TIP, be completed by BIA within 45 days from the date of receipt, except under unusual circumstances. Quarterly updates would ensure that BIA's update of the IRR TIP would occur on a regular schedule and would not be overly burdensome since it would be similar to the schedule by which State TIPS are updated. As proposed by the Tribal version, allowances are made for unusual circumstances. Regardless of how frequently an IRR TIP is updated, the 45-day limit is reasonable and will better ensure that IRR TIPS are accurate.

The Tribal Caucus recommends and requests public comment on the following regulatory provision to accomplish this goal:

How Is the IRR TIP Updated?

The updating process begins when BIA provides the projected IRR funding amounts to each tribe, or an analysis of the existing tribal priority list or TTIP. New transportation planning information or substantial changes to an IRR tribal project may require an IRR TIP update. BIA reviews the programming of proposed projects with the Indian tribal government and agreed upon adjustments are made to the IRR TIP on a quarterly basis or as otherwise needed. This updating process will, except under unusual circumstances, be completed within 45 days of receipt by BIA of the updated TTIP or tribal priority list submitted by the tribe.

Federal View

This issue involves the frequency of updating the IRR Transportation Improvement Program. Prior to Fiscal Year 2000, BIA submitted quarterly updated IRR TIPS to FHWA for review and approval. This quarterly procedure often resulted in untimely submissions of IRR TIPS to FHWA. This was a result of the overall TIP and Control Schedule

process, which required involvement of BIA Regional offices, BIA Division of Transportation in Albuquerque, and BIA DOT in Washington, DC. In addition, many of the quarterly updated TIPS submitted did not contain any significant changes to the previously approved TIP (*i.e.*, addition or deletion of projects). Therefore, a time-consuming exercise was conducted to produce an "update" that really did not update the TIP. Also, updating TIPS quarterly for 12 BIA Regions imposes an additional approximately 70 per cent cost in processing IRR TIPS.

Beginning in Fiscal Year 2000, FHWA requested that BIA submit TIP updates on an annual basis only, with updates submitted as required to reflect projects added to or deleted from the current TIP. Minor adjustments to funding between various projects, or within the activities (Preliminary Engineering, Construction Engineering, Construction) of a particular project, were determined to be insignificant and did not require the submittal of a TIP update.

The Federal view is that for Fiscal Year 2002 and beyond, the IRR TIP submittal process described above be continued for the following reasons:

(1) The IRR TIP development and submittal process is complex and lengthy. Performing four updates in one fiscal year may unnecessarily duplicate effort on the part of BIA and tribes, which could be performing other programmatic activities.

(2) The annual IRR Program funding, once established for a Fiscal Year, does not vary significantly within that Fiscal Year for a particular region or tribe, some minor increases or decreases may occur. Therefore, substantial changes to a TIP would not be anticipated over the course of a Fiscal Year, and updates would not be necessary on a frequent basis.

(3) Since public involvement process must occur before every TIP or TIP update/amendment is approved, fewer amendments would therefore decrease the necessity for multiple public involvement meetings for a single region's TIP, making the overall TIP approval process faster.

(4) Limiting the amount of TIPS submitted in a given Fiscal Year forces the tribes and BIA regions to conduct better "up front" planning cooperatively to ensure all tribal priorities are being initially included in the TIP. While it is understood that leadership changes in a tribe may require mid-year changes to a TIP, these changes could be better coordinated to prompt only one amendment per year rather than the recommended three per year.

The Federal view is that IRR TIPS only require updating as necessary not quarterly.

The Federal proposal is as follows:

How Is the IRR TIP Updated?

The updating process begins when BIA provides the projected IRR Program funding amounts to each tribe, or an analysis of the existing tribal priority list or TTIP. New transportation planning information or substantial changes to an IRR tribal project may require an IRR TIP update. BIA reviews the programming of proposed projects with the tribes. Agreed upon adjustments are made to the IRR TIP following the IRR TIP process defined in this part on an annual basis or as otherwise needed.

D. PS&E Approval Authority—Subpart D

The tribal caucus and Federal caucus disagree on the issue of whether a tribe may assume the review and approve plans, specifications and estimates. The Federal text is inserted at §§ 170.480–481.

Tribal View

The Tribal Caucus position is that the review and approval of plans, specifications and estimate (PS&E) packages are activities that Indian tribes may assume under self-determination contracts or self-governance agreements. In fact, the Interior Department has already permitted tribal assumption under a self-governance agreement of the authority to review and approve PS&E packages in the IRR Self-Governance demonstration. Similarly, Indian tribes, as public authorities, may assume the authority to review and approve PS&E packages under a Stewardship Agreement. Moreover, it is the Tribal Caucus position that an ISDEAA agreement can either serve as a Stewardship Agreement or incorporate an existing Stewardship Agreement of the tribe, to enable the tribe to, among other things, review and approve PS&E packages.

The Tribal Caucus acknowledges that all PS&E packages must be signed and/or sealed by a licensed professional engineer. However, it is the Tribal Caucus position that the extra-statutory "health and safety review" that the Federal Caucus insists on having simply is not required so long as the Indian tribe or tribal organization has provided assurances in the contract or agreement that the construction will meet or exceed proper health and safety standards, the licensed professional engineer approving the PS&E has certified that the plans and specifications meet or exceed the proper health and safety standards, and BIA receives a copy of this certification. See

25 U.S.C. 458cc(e)(2) ("In all construction projects performed pursuant to this part, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.") (Emphasis added.) The Tribal Caucus approach is substantially the same as the clarification approach recently considered by the Senate Committee on Indian Affairs, which remarked: "[P]roviding tribes flexibility in meeting health and safety standards will not limit the ability of BIA or FHWA to ensure that the IRR roads and bridges are built safely and efficiently. BIA will retain its monitoring and final inspection authorities as currently permitted under law * * * Retaining a bureaucratic check on every detail of IRR planning and construction is unnecessary and creates redundancy and inefficiency." Senate Report 106–406 at pp. 6–7 (Sept. 11, 2000).

The Tribal Caucus strongly disagrees with the Federal Caucus' approach to this issue because it would place unnecessary and burdensome requirements on Indian tribes before they would be deemed eligible by FHWA to assume PS&E approval authority for IRR projects. As proposed by the Federal Caucus, only Indian tribes which meet 'the requirements of a state as defined in 23 U.S.C. 302(a)' of TEA–21 and enter into a tribal IRR Program stewardship agreement with DOT would be delegated PS&E review and approval authority for IRR projects. The Federal Caucus has not identified in its proposed regulation what FHWA requirements an Indian tribe would need to satisfy to demonstrate that it has 'adequate powers' and is 'suitably equipped and organized to discharge to the satisfaction of the Secretary [of Transportation] the duties required by this title' as set forth in 23 U.S.C. 302. Also, the Federal Caucus references 23 U.S.C. 106, 302 and 402 as giving FHWA authority to determine which public authorities, including tribes, are capable of approving PS&E packages, conducting project audits, project closeouts, inspections, and controls. However, sections 106 and 302 by their own terms only apply to state transportation departments, and do not apply to Indian tribes or the Federal Lands Highway Program. Also, section 402 addresses Highway Safety Programs only.

The Federal Caucus' proposal would require that a tribe also negotiate a separate stewardship agreement with DOT, rather than permitting the tribe to assume such duties under its self-determination contract or self-governance agreement. It is unclear why

stewardship provisions cannot be included in a self-determination contract or self-governance agreement, when such agreements can be used to explain the roles and responsibilities of the federal and tribal parties to the agreement. The Federal Caucus provision would further require that stewardship agreements include provisions for a health and safety review by the Secretary of the Interior and contain provisions and procedures by which the facility owner may review the PS&E. These provisions would place far too much discretion in the hands of FHWA, mandate agency oversight where such oversight may not be warranted, and increase the regulatory burden on tribes. The Tribal Caucus solution is to streamline the process as Congress intended.

The Tribal Caucus proposes the following two regulatory provisions to clarify this issue:

Can a Tribe Review and Approve PS&E Packages for IRR Projects?

Yes. As a public authority, a tribe may assume review and approval authority of PS&E packages under a Stewardship Agreement pursuant to a Public Law 93–638 contract or self-governance agreement. The Public Law 93–638 contract or self-governance agreement may serve as the Stewardship Agreement. Alternatively, a tribe without a Stewardship Agreement may assume responsibility to review and approve PS&E packages under a self-determination contract or self-governance agreement so long as the Indian tribe or tribal organization has:

- (1) Provided assurances in the contract or agreement that the construction will meet or exceed proper health and safety standards;
- (2) obtained the advance review of the plans and specifications from a licensed professional engineer who has certified that the plans and specifications meet or exceed the proper health and safety standards; and
- (3) provided a copy of the certification to BIA.

Must All PS&E Packages Be Approved?

Yes. All PS&E packages must be signed and/or sealed by the appropriate licensed professional engineer, and by the appropriate official as follows:

- (a) Absent an approved Stewardship Agreement, FHWA approves all PS&E packages submitted by BIA;
- (b) Where an approved Stewardship Agreement exists between FHWA and the BIA Regional Office, PS&E packages are approved by an official in the BIA Regional Office;
- (c) Where an Indian tribe has assumed the responsibility to approve PS&E packages for IRR projects, in accordance with the question and answer above, the PS&E packages are approved by the tribe;
- (d) Where an Indian tribe has not assumed the responsibility to approve PS&E packages under paragraph (c) above, PS&E packages are approved under paragraph (a) or (b) above, as applicable.

Federal View

Under 23 U.S.C. 106, 302 and 402 certain activities can be delegated to public authorities which have adequate powers and are suitably equipped and organized to carry out, to the satisfaction of the Secretary, the duties of Title 23. These include Plans, Specifications, and Estimate (PS&E) approval, conducting project audits, project closeouts, inspections, materials testing, and quality control. Moreover, since Public Law 93–638 requires the Secretary to assure health and safety, the Secretary must still review the PS&E, even if PS&E approval has been delegated to the public authority. It follows that the facility owner/maintainer must concur with the proposed construction activities. Finally, inclusion of PS&E approval and other stewardship provisions in a recent pilot self-governance agreement has created a situation where changes to the stewardship provisions are requested on a yearly basis. While tribes can enter into a stewardship agreement with the Secretary of Transportation, such stewardship provisions cannot be included in a self-determination contract or self-governance agreement.

The Federal proposal is as follows:

Can a Tribe Review and Approve PS&E Packages for IRR Projects?

Yes, a tribe can review and approve PS&E packages for IRR projects if the tribe meets the requirements of a state as defined in 23 U.S.C. 302 (a) and enters into a tribal IRR Program stewardship agreement with the Secretary of Transportation or designee.

Who Must Approve all PS&E Packages?

All PS&E packages must be signed and/or sealed by the appropriate licensed professional engineer and by the appropriate official as follows:

- (a) Absent an approved IRR Program stewardship agreement, FHWA approves all PS&E packages submitted by BIA;
- (b) When an approved BIA regional IRR Program stewardship agreement exists, PS&E packages are approved by an official in the BIA regional office;
- (c) When a tribe has assumed the responsibility to approve PS&E packages for tribal, state, and locally owned IRR facilities through a tribal IRR Program stewardship agreement, the tribe approves PS&E packages with the consent of the facility owner after a health and safety review by the Secretary;
- (d) When a tribe has not assumed the responsibility to approve PS&E packages under paragraph (c) above, BIA or FHWA approves PS&E packages under paragraph (a) or (b) above, as applicable.

E. IRR Construction Project Reports—Subpart D

The issue is how to regulate IRR construction project closeouts. The

Federal text is inserted at §§ 170.485–489.

Tribal View

Detailed program oversight regulations have been developed by the Committee, with a number of provisions devoted to preparation of the IRR construction project close out report. The Federal and Tribal Caucuses did not reach consensus on a number of regulatory provisions governing the closeout of an IRR construction project. The Tribal and Federal Caucuses agreed to revise some regulatory provisions to substitute “IRR construction project report” in place of “IRR construction project audit” as the focus of the question and to delete regulations addressing an IRR project audit. It was the view of the Tribal Caucus that project audits were adequately addressed in existing Title I and Title IV regulations implementing the ISDEAA (See 25 CFR parts 900 and 1000). In some instances, the proposed regulations were corrected to reflect this intent. One regulatory provision, however, does not appear to have been modified as the Tribal Caucus believes should have been done. As a result, the proposed regulation contains a provision relating to an IRR construction project audit. The Tribal Caucus believes that the IRR regulations should only address IRR construction project closeout reports and omit any discussion of IRR project audits. Substitution of the phrase “construction project report” for the phrase “project audit” will accomplish this goal.

Accordingly, the Tribal Caucus proposes the following regulatory provision and requests public comment:

Who Has Final Acceptance of the IRR Construction Project Report?

- (a) With regard to IRR construction projects performed by BIA, the Secretary has final acceptance and approval of the IRR construction project report.
- (b) With regard to IRR construction projects performed by tribes under Public Law 93–638, the signatory authority has final acceptance and approval of the IRR construction project report.

The Tribal Caucus differed with the Federal Caucus on the requirement that, as part of an IRR construction project closeout, the facility owner must accept the IRR project. It is the Tribal Caucus' view that closeout of an IRR construction project, which the regulations define as the final accounting of all IRR construction project expenditures and closing of the financial books of the Federal Government for the project, occurs once the final inspection has been completed and the IRR construction project has

been accepted by the signatory authority for the project, which is the entity with final authority to sign the PS&E package.

Therefore, the Tribal Caucus recommends and requests public comment on the following regulatory provision:

When Does a Project Closeout Occur?

A project closeout occurs after the final project inspection is concluded and the IRR project is accepted by the signatory authority (the entity with final authority to sign the PS&E package).

It is the Tribal Caucus position that no regulation is required to identify the entity which must conduct the project closeout and prepare the IRR construction project closeout report. When an IRR construction project is performed by an Indian tribe under a self-determination contract or self-governance agreement, Title I and Title IV regulations implementing the ISDEAA adequately address the issue of who must conduct the project closeout and develop the IRR construction project closeout report. For example, 25 CFR 900.130(d) states: "Upon completion of the project, the Indian tribe or tribal organization shall provide to the Secretary a reproducible copy of the record plans and a contract closeout report." The Tribal and Federal Caucuses agree on this point. The Tribal Caucus, however, does not believe that the Federal Caucus has appropriately described the circumstances under which BIA performs the IRR construction project on behalf of a tribe. The Federal Caucus supports regulatory text which states that: "When the activity and/or project is conducted using BIA force account, [the] Regional Engineer or designee is responsible for closing out the project and preparing the report." BIA force account is only one of several methods available to BIA when it performs the IRR construction projects on behalf of tribes. As a result, it is the Tribal Caucus' position that no IRR regulatory provision is preferable to the incomplete provision proposed by the Federal Caucus.

The Tribal Caucus believes that the Title I Self-Determination regulations (25 CFR part 900) and Title IV Self-Governance regulations (25 CFR part 1000) adequately cover the project closeout reporting obligations of Indian tribes performing IRR activities under the ISDEAA. While it is appropriate for these proposed IRR regulations to identify the content of the project closeout report when BIA administers the IRR Program for a particular tribe, the regulations should leave the content of the IRR construction project closeout report to the negotiations between BIA

and a tribe when a tribe assumes the obligation to prepare the closeout report under an ISDEAA agreement. The Tribal Caucus disagrees with the Federal Caucus' proposed regulation which mandates that "all project information must be made accessible for the IRR construction project closeout" when a project closeout and preparation of the closeout report is undertaken by a tribe under a self-determination contract or self-governance agreement.

It is the Tribal Caucus position that the proposed regulation be limited to BIA's preparation of the closeout report and leave the scope of project information to be made accessible for the IRR construction project closeout, when a tribe assumes such duties under the authorities of the ISDEAA, to the negotiation of BIA and the tribe.

The Tribal Caucus therefore requests public comment on the following recommended regulatory provision:

What Information Is Made Available for the Project Closeout?

If the project closeout and development of project closeout report is not contracted or compacted then all project information must be made accessible for the IRR construction project closeout. Such information may include, but is not limited to: Daily diaries, weekly progress reports, sub-contracts, subcontract expenditures, salaries, equipment expenditures, etc.

The Tribal Caucus believes that it is not necessary to identify in these regulations the entities which must receive a copy of the IRR construction project closeout report. As drafted, however, the proposed regulation is incomplete as it only addresses the entities to receive the closeout report for IRR construction projects when such projects are assumed under a self-determination contract or self-governance agreement. The proposed regulation fails to address the obligation of BIA to provide the closeout report to the Indian tribal government served by the construction project and to appropriate BIA officials, such as BIA Regional Engineer, BIA Agency Superintendent or Field Officer. The proposed regulation would read as follows:

Who Is Provided a Copy of the IRR Construction Project Closeout Report?

Projects negotiated under Public Law 93-638, as amended, shall specify who will be provided a copy of the closeout report.

Unless the proposed regulation is corrected in the final regulation to identify the recipients of the IRR construction project closeout report, regardless of which entity prepares the

report, the Tribal Caucus position is to delete the provision entirely.

Federal View

The issue appears to be whether these regulations need to address project closeouts and audit. 25 CFR 900.131(b)(10) states that "The Secretary retains the right to conduct final projects inspections jointly with the Indian tribe or tribal organization and to accept the building or facility." A similar provision for self-governance tribes is provided in 25 CFR 1000.249(e). While 25 CFR 900.130(d) does contain project closeout requirements for self-determination contracts there is no similar provision for self-governance tribes in 25 CFR part 1000.

The Federal proposal is as follows:

Who Has Final Acceptance of the IRR Project Audit?

The Secretary has final acceptance and approval of the project including the IRR project audit.

When Does a Project Closeout Occur?

A project closeout occurs after the final project inspection is concluded and the IRR project is accepted by the facility owner and the Secretary.

Who Must Conduct the Project Closeout and Develop the Report?

(a) The self-determination contract or self-governance agreement must specify who is responsible for project closeout and development of a final report.

(b) The Secretary is responsible for closing out the project and preparing the report when the project is conducted by the Secretary.

What Information Must Be Made Available for the Project Closeout?

(a) When the Secretary conducts the project, all project information must be made accessible for the IRR construction project closeout. Such information may include, but is not limited to: Daily diaries, weekly progress reports, subcontracts, subcontract expenditures, salaries, equipment expenditures, etc.

(b) When a tribe conducts the project under a self-determination contract or self-governance agreement, all project information must be made accessible for the IRR construction project closeout. Such information may include but is not limited to: Daily diaries, weekly progress reports, subcontracts, subcontract expenditures, salaries, equipment expenditures, etc.

Who Is Provided a Copy of the IRR Construction Project Closeout Report?

(a) When the Secretary conducts the project, copies of the IRR construction project closeout reports are provided to the affected tribes and the Secretary of Transportation.

(b) When a tribe conducts the project under a self-determination contract or self-governance agreement, the contract or agreement must specify who will be provided a copy of the closeout report.

F. Content of Rights-of-Way Documents—Subpart D

The issue is on use of 25 CFR 169 in these regulations for IRR's as authority for rights-of-way over Indian Lands. The Federal text is inserted at §§ 170.501–502.

Tribal View

The Tribal Caucus is in general agreement with the Federal Caucus on the minimum content of a right-of-way document. The Tribal Caucus, however, disagrees that the status of the land dictates the content of the right-of-way document and strongly disagrees with the Federal Caucus' reliance upon and reference to 25 CFR 169 (Rights-of-Way Over Indian Lands) in these proposed regulations without appropriate qualifications. This is especially so in cases where it is the Indian tribe itself which seeks to construct a road across its own trust or restricted fee lands.

Part 169 primarily sets out procedures by which third parties, such as railroads, utilities, and state or local governments, obtain rights-of-ways over reservation lands. Many of the requirements of part 169 are not applicable to Indian tribes securing rights-of-way for roads on their own reservations. For example, 25 CFR 169.4 requires that an applicant for a right-of-way apply for permission to survey the land, and in connection with the application, must demonstrate to BIA's satisfaction its good faith and financial responsibility. Part 169 also requires that applicants must also agree to indemnify the United States, the owners and occupants of the land against liability for loss of life, personal injury and property damage occurring because of survey activities caused by the applicant. 25 CFR 169.14 requires an applicant for a right-of-way to make a deposit to cover damages and consideration for acquiring right-of-way at the time of making the application.

By cross-referencing 25 CFR part 169, the proposed regulations do not set out a clear response to the questions posed, but instead generate a series of questions about the extent to which part 169 should apply to the IRR Program. The Tribal Caucus recommends that the content of right-of-way documents be uniform and that no distinction be made in the right-of-way document regardless of whether the right-of-way sought is over trust, restricted fee, or fee simple lands.

Another concern of the Tribal Caucus is that some tribes have federal statutory authority to grant rights-of-way across their reservations without Secretarial approval under part 169. See, *e.g.*, 64

Stat. 442, as amended, 75 Stat. 499 § 2. The Tribal Caucus has proposed edits to a number of questions which acknowledge that some tribes have this authority, without otherwise altering the applicability of part 169 where part 169 is appropriate. The Tribal Caucus recommends that a provision be added to the regulation which makes clear that “nothing in this part is intended to supersede 25 CFR part 169 where part 169 is applicable to the right-of-way at issue.”

The Tribal Caucus therefore requests public comment on the following regulatory provisions:

What Must the Rights-of-way Easement Documents Contain at a Minimum?

(a) All rights-of-way documents shall include the following:

- (1) Identification of the grantor and grantee;
 - (2) Legal description of the property acquired for the right-of-way;
 - (3) Right-of-way plat/map of definite location;
 - (4) A statement of the term of the right-of-way, whether for a specific term of years, whether it includes a right of renewal, or whether the grant is in perpetuity;
 - (5) Terms and conditions on the grant of the right-of-way, including but not limited to, other permissible uses of the right-of-way, or specific restrictions on the rights-of-way easements;
 - (6) Identification of whether the rights-of-way includes the right to construct, and/or re-construct the facility; and
 - (7) A statement on whether the right-of-way may be transferred or assigned, and the terms and conditions under which a transfer or assignment may occur.
- (b) Nothing in this part is intended to supersede the requirements of 25 CFR part 169 where part 169 is applicable to the right-of-way at issue.
- (c) A right-of-way document, if covering maintenance, may include an identification of maintenance responsibilities assumed by the grantee or retained by the grantor, and whether such rights convey with any transfer of the rights-of-way.

It is the Tribal Caucus' view that procedures for acquiring rights-of-way over Indian trust lands and Indian lands subject to a restraint against alienation (restricted fee lands) should be the same, and separate regulatory provisions should address procedures to acquire right-of-way interests which traverse fee simple lands which are not subject of a federal restraint against alienation. The Tribal Caucus further believes that the party who must consent to the granting of a right-of-way will also depend upon the status of the land in question. In cases where an Indian tribe has granted a use right on its reservation to an individual Indian by virtue of a land use assignment, the Tribal Caucus believes that acquiring

the individual Indian's interest for purposes of a right-of-way must be done in accordance with applicable tribal law and require the written consent of the tribe. The Tribal Caucus believes that this course of action is entirely consistent with applicable tribal law regarding such arrangements. The Tribal and Federal Caucuses also disagree on the applicability of part 169 to all rights-of-way over Indian allotted lands. It is the Tribal Caucus' view that other federal laws may apply and that the regulation should simply reflect that part 169 “or such other federal law” as may apply to the allotment at issue. As noted above, part 169 primarily addresses the procedures which third parties acquire right-of-way interests over Indian lands. If the regulations are to govern a tribe's administration of the IRR Program, the regulation must be drafted to accommodate both BIA and tribal administration of the program, and not be focused solely on BIA.

The Tribal Caucus recommends and requests public comment on the following regulatory provisions:

Who Grants a Right-of-way on Indian Trust or Restricted Fee Lands?

The tribe must consent in writing to the granting of a right-of-way on any land title to which is held by the tribe or in which the tribe holds a beneficial interest. Where an individual Indian has an interest in tribal land by virtue of a land use assignment, acquisition of the individual Indian's interest for purposes of a right-of-way shall be done in accord with applicable tribal law, and require the written consent of the tribe. Where an individual Indian holds an allotment in trust or subject to a restraint against alienation, acquisition of a right-of-way over such allotment must be made in accordance with 25 CFR 169, or such other federal law as may apply to the allotment at issue.

Federal View

With respect to questions affecting rights-of-way over Indian lands, the existing regulations covered in 25 CFR 169 are adequate. It is the Federal view that any issues beyond the scope of the existing 25 CFR 169 are properly dealt with in a future revision of part 169 and are inappropriate for inclusion in this rule or for public comment.

The Federal proposal is for two additional questions that reference 25 CFR 169 and reflect the minimum information an easement document must contain. They are as follows:

What Must a Right-of-way Easement Document Contain at a Minimum?

(a) For rights-of-way across Indian trust and restricted lands, those documents required by 25 CFR 169 must be submitted; and

(b) For lands other than trust or restricted, the following information must be submitted:

(1) Identification of the grantor and grantee;

(2) A legal description of the property acquired for the right-of-way;

(3) A right-of-way plat/map of definite location;

(4) A statement of the term of the right-of-way, whether for a specific term of years, whether it includes a right of renewal, or whether the grant is in perpetuity;

(5) Terms and conditions on the grant of the right-of-way, including but not limited to, other permissible uses of the right-of-way, or specific restrictions on the rights-of-way easements;

(6) Identification of whether the rights-of-way includes the right to construct, and/or re-construct the facility; and

(7) A statement on whether the right-of-way may be transferred or assigned and the terms and conditions under which a transfer or assignment may occur.

(c) If a rights-of-way document covers maintenance it may include an identification of maintenance responsibilities assumed by the grantee or retained by the grantor and whether such rights convey with any transfer of the rights-of-way.

How Are Rights-of-Way Granted on Indian Trust or Restricted Fee Lands?

Grants of right-of-way must be made under the provisions of 25 CFR 169.

G. Self-Governance Compacts—Subpart E

This issue is whether under the ISDEAA tribes may assume only individual IRR projects or all IRR projects that are not inherently Federal functions. The Federal text is inserted at §§ 170.633–170.634.

Tribal View

The Federal Caucus approach appears to be that Indian tribes may only assume individual IRR projects. It is the Tribal Caucus' position that this approach is inconsistent with TEA–21 or Public Law 93–638, as amended, and limits the opportunity for tribes to administer entire IRR construction programs under a self-governance agreement.

TEA–21 specifically includes language that accommodates the ability of an Indian tribe to assume under a self-governance agreement all IRR Program activities that are not inherently federal functions:

(3) Contracts and Agreements with Indian tribes—

(A) *In General.*—Notwithstanding any other provision of law or interagency agreement, program guideline, manual, or policy directive, *all funds made available under this title* for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the cost of programs, services, functions, and activities, or portions thereof, that are specifically or functionally related to the cost of planning,

research, engineering, and construction of any highway, road, bridge, parkway, or transit facility that provides access to or is located within the reservation or community of an Indian tribe *shall be made available*, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning, research, engineering, and construction *in accordance with the Indian Self-Determination and Education Assistance Act.*

(B) *Exclusion of Agency Participation.*—Funds for programs, services, functions, and activities, or portions thereof, *including supportive administrative functions that are otherwise contractible to which subparagraph (A) applies*, shall be paid in accordance with subparagraph (A) without regard to the organizational level at which the Department of the Interior that has previously carried out such programs, services, functions, or activities. 23 U.S.C. 202(d)(3). [Emphasis added.]

The Tribal Caucus position is that these part 170 regulations should contain provisions that both recognize and appropriately accommodate the ability of Indian tribes to assume under a self-governance agreement all IRR Program activities that are not inherently federal functions.

Federal View

Section 1000.240 of 25 CFR specifies that the IRR construction program including projects and activities are subject to 25 CFR 1000, subpart K and that these regulations should reference subpart K. Sections 1000.87 and 1000.243 require that the agreement specify in writing the services, functions, and responsibilities to be assumed by the tribe/consortium and those retained by the Secretary. Since an FHWA-approved IRR TIP is the document approving the use of IRR Program funds for projects and activities, it is appropriate that each project, by activity performed by the tribe/consortium, be listed separately in the agreement in sufficient detail to adequately describe the work or through attachment of the IRR TIP and Control Schedule.

The Federal proposal is as follows:

What IRR Programs, Functions, Services, and Activities Are Subject to the Construction Regulations Set Forth in Subpart K of 25 CFR Part 1000?

All IRR design and construction projects and activities, whether included separately or under a program in the agreement, are subject to the construction regulations set forth in subpart K of 25 CFR part 1000.

How Are IRR Program Projects and Activities Included in the Self-governance Agreement?

IRR Program projects and activities are included in the self-governance agreement as specific line items for each project or activity with sufficient detail to adequately describe the work as included in FHWA-approved IRR

TIP and Control Schedule. Also, each agreement must include all other information required under 25 CFR 1000, subpart K.

H. Content of Stewardship Agreements—Subpart F

The issues are whether a tribe may enter into a Stewardship Agreement with FHWA directly and what a Stewardship Agreement must contain. The Federal text is inserted at §§ 170.701–170.705.

Tribal View

The Tribal Caucus agrees with the Federal Caucus that a Stewardship Agreement is an agreement between FHWA and the BIA Regional Office for assumption of FHWA's responsibilities for approval of Plans, Specifications & Estimates (PS&E). It was not the intent of the Tribal Caucus, however, that by agreeing to this definition, an Indian tribe would be precluded from entering into a Stewardship Agreement directly with FHWA and incorporate such agreement into its self-determination contract or self-governance agreement. Alternatively, a tribe without a Stewardship Agreement can assume authority to review and approve PS&E packages under a self-determination contract or self-governance agreement. There was no consensus on the mechanism by which an Indian tribe could assume PS&E approval when such authority had been delegated by FHWA to BIA. The Tribal Caucus recognizes the authority of Indian tribes to develop their own policies and procedures provided that such policies and procedures are consistent with applicable Federal requirements.

The tribal recommendation is to revise the proposed regulation to simply list the content of the Stewardship Agreement without identifying whether a particular activity is performed by BIA or a tribe and to require that the work to be performed will comply with "applicable requirements" (Federal or tribal) rather than stating that the work must meet "prescribed policies and procedures of BIA and FHWA." To achieve this result, the Tribal Caucus recommends revising the proposed regulation to read as follows:

What Must Be Included in an IRR Program Stewardship Agreement?

An IRR Program Stewardship Agreement must include:

(a) Description of the planning, design, construction, and maintenance activities developed to ensure work meets applicable requirements;

(b) Assumption of review and approval of PS&Es developed for Indian Reservation Road (IRR) construction projects and project monitoring; and

(c) The standards which will be implemented in accordance with these regulations.

Nothing in the Stewardship Agreement shall be construed to diminish or effect the rights, privileges and responsibilities of Indian tribes or tribal organizations to administer IRR programs under a self-determination contract or self-governance agreement, or to incorporate these IRR Program activities into such a contract or agreement.

Federal View

23 U.S.C. 204(j) provides that projects selected by tribes from the TIP shall be subject to the approval of both the Secretary and the Secretary of Transportation. This includes approval of the plans, specifications, and estimates. 23 U.S.C. 106 allows the Secretary of Transportation to enter into agreements with public authorities that address assumption of some of the Secretary's responsibilities. 23 U.S.C. 302 requires public authorities that participate in the highway program have adequate powers and be suitably equipped and organized to carry out, to the satisfaction of the Secretary, the duties required in Title 23. Prior to TEA-21, this assumption was covered in 23 U.S.C. 117, certification acceptance. Certification acceptance agreements included:

- (1) Identification of which project approvals were delegated to BIA;
- (2) Identification of Federal requirements that had to be adhered to in BIA's administration of these project authorities and handling of exceptions; and,
- (3) BIA processes for providing the internal management of these authorities in lieu of Federal involvement.

FHWA has developed policy on stewardship and program oversight instead of issuing regulations. Any such agreements must be consistent with this policy. Hence, all such agreements will require FHWA review and approval because they deal with FHWA responsibilities.

The Federal proposal is as follows:

What Is a IRR Program Stewardship Agreement?

It is an agreement between FHWA and BIA Division of Transportation for assuming FHWA's responsibilities for planning, design, and construction within the IRR Program.

What Is a BIA Regional IRR Program Stewardship Agreement?

It is an agreement between FHWA, BIA Division of Transportation and a BIA regional office for assuming FHWA's responsibilities of the planning, design, and construction within the IRR Program.

Can a Self-Determination Contract or Self-Governance Agreement Serve as an IRR Program Stewardship Agreement?

No. A tribe must use a tribal IRR Program stewardship agreement. It is a separate agreement which details the tribe's assuming a portion of FHWA's and/or BIA's responsibilities for planning, design, and construction within the IRR Program.

What Must Be Included in a BIA Regional or Tribal IRR Program Stewardship Agreement?

At a minimum, these agreements must include:

- (a) BIA regional roads or tribal transportation department organization chart;
- (b) An IRR project development and construction flow chart;
- (c) Description of the transportation planning, design, procurement, project administration, and construction processes to be followed;
- (d) IRR design and construction standards to be used in accordance with this part;
- (e) List of roles and responsibilities to be assumed;
- (f) Provisions and process for obtaining the Secretary's health and safety reviews of the PS&E; and
- (g) Provisions and processes for obtaining the facility owner's review of the PS&E.

What Is the Process for Obtaining the Facility Owner's Review of the PS&E?

The process is as follows:

- (a) BIA region or tribe prepares and submits an IRR Program stewardship agreement to BIA Division of Transportation. BIA Division of Transportation forwards a copy to FHWA;
- (b) BIA and FHWA visit the tribe or BIA region and evaluate the capabilities to assume the proposed IRR Program responsibilities;
- (c) FHWA, in writing, advises the tribe or BIA region of any applicable changes to the proposed stewardship agreement; and
- (d) After all changes are made, the revised agreement is approved by FHWA or its designee.

I. Arbitration Provisions—Subpart H

The disagreement in this section is about what alternative dispute resolution methods are available to the Federal government and tribes and how alternative dispute resolution options may be used. The Federal question and answer is inserted at §§ 170.941 through 170.952.

Tribal View

The ADR approach chosen must be "appropriate" for the situation and must not derogate the principals and authorities of the ISDEAA and its implementing regulations, and recognizes that ADR may be appropriate and is authorized in the construction context under the ADR Act; 25 U.S.C. 450j(a)(3), 450j(m)(3)(E), 450l (model contract section (b)(12)), 450m-1(d), 458cc(e)(1), 458cc(l); 41 U.S.C. 605(d)-(e); 25 CFR 900.122(b)(5),

900.131(b)(11)(iv), 900.217; 25 CFR 1000.84, 1000.252, 1000.422, 1000.424; and 48 CFR 33.214.

The Tribal Caucus would support clarification of this matter as follows:

Are Alternative Dispute Resolution Procedures Available to Self-Determination and Self-Governance Tribes and the Secretary to Resolve Disputes Between Them in Performing IRR Public Law 93-638 Activities?

Indian tribes and tribal organizations are entitled, at their option, to use the appropriate dispute resolution techniques or procedures set out in:

- (a) The ADR Act, 5 U.S.C. 571-583;
- (b) The Contract Disputes Act, 41 U.S.C. 601-613; and
- (c) The Indian Self-Determination and Education Assistance Act (including the mediation and alternative dispute resolution options listed in 25 U.S.C. 450l (model contract section (b)(12)) and the implementing regulations.

Federal View

This issue is about what alternative dispute resolution methods are available and how alternative dispute resolution options may be used. The Federal view allows arbitration as a different dispute resolution option as long as it does not conflict with existing regulations. The ADR Act requires the consent of both parties for any ADR technique to be used. In addition, it is the Federal Caucus' view that the Contract Disputes Act of 1978, 41 U.S.C. 601, as amended, Public Law 95-563, applies to Titles I and IV construction activities. The proposed regulation drafted by the Committee would improperly change those regulations. The Federal Caucus adds "for non-construction activities" to (c) to make clear that the model contract section is inapplicable to construction activities. The Federal Caucus' proposed question and answer is as follows:

Are Alternative Dispute Resolution Procedures Available to Self-Determination and Self-Governance Tribes and the Secretary to Resolve Disputes Between Them in Performing IRR Public Law 93-638 Activities?

Yes. Except as required in 25 CFR part 900 and part 1000, tribes and tribal organizations are entitled to use the appropriate dispute resolution techniques or procedures set out in:

- (a) The ADR Act, 5 U.S.C. 571-583;
- (b) The Contract Disputes Act, 41 U.S.C. 601-613; and
- (c) The Indian Self-Determination and Education Assistance Act (including the mediation and alternative dispute resolution options listed in 25 U.S.C. 450l (model contract section (b)(12)) and the implementing regulations for non-construction activities.

The Department considers the following issues to be outside the scope

of this rulemaking. However, because the Committee discussed these issues and attempted to come to consensus on them, they are presented to give a full picture of the Committee's deliberations.

J. Advance Funding—Subpart E

The issue is under what circumstances advance funding is available under self-determination contracts and self-governance agreements to tribes performing IRR construction and construction-engineering activities under these contracts and agreements. The Federal text is inserted at §§ 170.614–618.

Tribal View

The full Committee reached agreement regarding the advance payment of IRR funds to Indian tribal governments performing IRR non-construction activities under self-determination contracts and self-governance agreements. However, the Tribal Caucus and the Federal Caucus disagreed over the wording of proposed regulations for the advance payment of IRR funds to tribal governments performing IRR construction and construction-engineering activities under these contracts and agreements.

In the Tribal Caucus' view, the Federal Caucus' proposed advance funding provisions would impose restrictions on the awarding of advance payments that are unnecessary as a matter of law and unwise as a matter of policy. For the reasons explained below, the Tribal Caucus proposes that the following two "advance funding" provisions also be adopted when the full Committee develops the final rule:

May an Indian Tribe or Consortia Receive Advance Payment of IRR Funds Under a Self-Determination Contract for Construction Activities?

Yes. BIA and the tribes must negotiate a schedule of advance payments as part of the terms of a self-determination contract that includes construction or constructing engineering activities. Tribes may receive advance payments of IRR funds in annual, semiannual or quarterly installments in accordance with 25 CFR 900.132. Indian tribes may not expend funds advanced under this section for construction and construction engineering on an IRR project prior to approval of a PS&E for the project.

May an Indian Tribe or Consortia Receive Advance Payments of IRR Funds Under a Self-Governance Agreement?

Yes. Advance payments must be made to an Indian tribe in annual or semi-annual installments at the discretion of the tribe. Advance payments shall be made to the tribe in the amount established by the IRR funding formula. Within 21 days after apportionment, BIA shall transfer all IRR funds advanced

under this section to the Office of Self-Governance for prompt payment to the tribe or consortia. Indian tribes may not expend funds advanced under this section for IRR activities that are not included on an approved IRR TIP.

At a minimum, the advance payment of IRR funds to Indian tribal governments must conform to the strict mandates of TEA-21 and the ISDEAA and its implementing regulations. Title I of the ISDEAA generally provides that "[u]pon the approval of the self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled." 25 U.S.C. 450j-1(f); see also 25 CFR 900.19. Title IV of the ISDEAA requires that self-governance compacts and annual funding agreements "shall provide for advance payments to the tribes in the form of annual or semiannual installments at the discretion of the tribes." 25 U.S.C. 458cc(g)(2).

However, the Title I self-determination regulations contain a special advance funding provision for construction contracts which requires that BIA provide advance funding to tribes performing construction contracts on at least a quarterly basis. See 25 CFR 900.132. In other words, quarterly advance payments are the minimum amounts authorized by law for self-determination construction contracts, but BIA and contracting tribes may negotiate an advance payment schedule on terms even more favorable to the tribes, based on the factors listed in the regulation.

It makes sense to transfer scarce IRR funds into an Indian tribe's IRR Program account as soon as possible so that the money can begin drawing interest and the tribe can better manage IRR planning, design, construction, and maintenance activities. These IRR regulations should promote sensible economic practices and, wherever possible, maximize the benefits of scarce IRR funding for the Indian people the IRR Program is intended to serve. There are many statutory and accounting protections in place, up to and including the threat of criminal prosecution, which act to prevent tribes from misusing advance payments. Self-determination and self-governance tribes have been receiving lump sum advance payments for years to do everything from running hospitals to operating housing programs. There is nothing special or different about the IRR Program which suggests tribes cannot be trusted to behave appropriately when building or maintaining their IRR road systems.

Throughout these negotiations, the Tribal Caucus has sought to clarify that BIA is authorized—and, in the case of self-governance agreements, required—to make advance payments of IRR funds to Indian tribal governments in annual, semiannual or quarterly installments, at the discretion of the tribe. Therefore, the Tribal Caucus believes that the IRR regulations should authorize, in clear and simple language, the advance payment of IRR funds to Indian tribes on the terms that the tribes themselves propose. These regulations should also clarify that advanced IRR funds must be paid to tribes as soon as possible after the start of the fiscal year.

Federal View

The Federal representatives are aware of the different payment provisions contained in Titles I, II, IV, V, and section 108 of the Indian Self-Determination and Education Assistance Act, as amended. Thus, how and when advance payments are made is based on which type of document (contract, grant, agreement) is used. The Committee reached agreement on an advance payments provision for section 108.

For Title I, the Secretary is given discretion to advance funds for self-determination contracts under 25 CFR 900.132. It is the Federal view that this regulation adequately addresses advance payments for construction and construction engineering activities included in a self-determination contract. In a design/construct self-determination contract, the Federal view is that advance payments for construction and construction engineering are based on progress and need as well as the negotiated payment schedule. Advancing funds beyond that permitted in 25 CFR 900.132 is neither required nor a prudent administration of IRR Program funds. Advancing funds for construction and construction engineering prior to PS&E approval would create problems if the design of the project is never completed and construction does not begin.

Congress, in Title V provisions (which applies only to the Indian Health Service), now authorizes advance payments for construction not only based on need, but also based on expenditures.

For Title IV, the Federal view is to use the statutory language to address advance payments and use a separate provision for adjusting for additional funds. In addition, the Federal proposal is consistent with 23 U.S.C. 204(j). Also, 25 CFR 1000.104 already contains procedures for adjusting funding amounts negotiated in an agreement

during the year it is in effect. The Federal representatives see no reason to develop an alternative process.

The Federal proposal is as follows:

May the Secretary Advance Payments of IRR Funds to a Tribe Under a Self-Determination Contract for Construction Activities?

Yes. The Secretary and the tribe must negotiate a schedule of advance payments as part of the term of a self-determination contract in accordance with 25 CFR 900.132.

What Is a Design/Construct IRR Self-Determination Contract?

It is a self-determination contract which includes both the design and construction of one or more IRR projects.

May the Secretary Advance Payments of IRR Funds to a Tribe Under a Self-Determination Design/Construct Contract for Construction Activities?

Yes. When making at least quarterly advance payments for construction and construction engineering, the Secretary includes IRR Program funds based on progress, need, and the payment schedule negotiated under 25 CFR 900.132.

May the Secretary Advance Payments of IRR Funds to a Tribe or Consortia Under a Self-Governance Agreement?

Yes. Advance payments must be made to the tribes/consortia in the form of annual or semiannual installments as indicated in the agreement.

How Are Advance Payments Made When Additional IRR Funds Are Made Available After Execution of the Self-Governance Agreement?

When additional IRR funds are available, following the procedures set forth in 25 CFR 1000.104, tribes can request to use the additional funds for approved IRR activities or projects contained in a subsequent year of FHWA-approved IRR TIP, and immediately have those funds added to the agreement.

K. Contractibility and Compactibility of TEA-21 Programs—Subpart E

The disagreements under contractibility and compactibility involve use of the “up to 6%” management funds. The Federal questions and answers are inserted at §§ 170.600 through 170.636.

Tribal View

The Tribal and Federal Caucuses strongly disagree on several issues related to the contractibility/compactibility of TEA-21 programs and funds: (1) Exactly what functions are contractible/compactible by tribes, and, generally, how is contractibility/compactibility under the ISDEAA to be determined? (2) Are programs and funds associated with the “6 percent funds” contractible/compactible under the ISDEAA? (3) May BIA reserve, up front, 6 percent of the Federal Highway Trust

Fund for “non-contractible” administrative functions and activities, thereby rendering such funds automatically unavailable to the tribes?

(4) May the 6 percent administrative funds be utilized to fund IRR Program Management Systems and public hearings for IRR planning and projects?

In connection with the first three of these questions the tribal team proposed a series of nine questions-and-answers as follows:

What IRR Program Functions May Be Assumed by an Indian Tribe in a Self-Determination or Self-Governance Agreement?

At the option of a tribe, all IRR functions, including those associated with BIA’s 6 percent administrative funds, other than inherent federal functions, may be included in a self-determination contract or self-governance agreement.

What Is an Inherently Federal Function?

An inherently Federal function is a Federal function that cannot legally be transferred to a self-determination and self-governance tribe.

How Will BIA and a Tribe Determine Which IRR Program Functions May Be Included in a Self-Determination or Self-Governance Agreement?

(a) At the request of a tribe, BIA and the tribe will jointly identify all of the IRR Program functions that are part of or support the program, function, service or activity, or portion thereof, which a tribe might wish to assume. BIA shall also identify an estimated cost to accompany each of the identified functions.

(b) BIA shall provide the requested information to the tribe in writing no later than 30 days after receipt of the request.

(c) BIA shall also identify which of these functions it believes are inherently federal functions, with the rationale to support its conclusion.

(d) BIA will meet with and negotiate with the tribe the cost of the identified assumable functions. BIA and the tribe shall also seek to reach agreement about which functions are appropriately considered inherently federal.

(e) BIA shall maintain and update a list of all IRR Program functions which Indian tribes assume under Title I or IV of Public Law 93-638, as amended. BIA shall distribute this list to each of the BIA Regional Offices and it shall be available for review by an interested tribe.

What Happens if a Tribe Disagrees With BIA That a Specific Function Is Inherently Federal?

Disagreement over what is an inherent federal function shall be dealt with in accordance with the dispute resolution processes set out in 25 CFR 900.150 *et seq.* or self-determination contracts and 25 CFR 1000.95 and 1000.420 *et seq.* for self-governance agreements.

What IRR Funds Must Be Transferred to a Tribe Under a Self-Determination Contract or Self-Governance Agreement?

At the option of the tribe, the Secretary must provide a tribe all funds, including an appropriate portion of the up to 6 percent administrative funds that BIA is authorized to retain under TEA-21, that are specifically or functionally related to BIA providing IRR functions to the tribe without regard to the organizational level within BIA where such functions are carried out. The only funds that the Secretary is not obligated to transfer to a tribe are residual funds.

What Are BIA Residual Funds?

BIA residual funds are the funds necessary to carry out BIA’s inherent Federal functions.

How Is BIA’s Residual Determined?

(a) Generally, residuals will be determined through a process that is consistent with the overall process used by BIA and in consultation with tribes. Residual information will consist of residual functions performed by BIA, a brief justification why the function is not contractible or compactible, and the estimated funding level for each residual function. Each Regional Office and the Central Office will compile a single document for distribution each year that contains all the residual information of that respective office. The development of the residual information will be based on the following principles. BIA will:

(1) Develop uniform residual information to be used to negotiate residuals;

(2) Ensure functional consistency throughout BIA in the determination of residuals;

(3) Make the determination of residuals based upon the functions actually being performed by BIA without regard to the organizational level to which the functions are being performed;

(4) Annually consult with tribes on a region-by-region basis as requested by tribes/consortia; and

(5) Notify tribal leaders each year by March 1 of the availability of residual information.

(b) BIA shall use the residual information determined under subparagraph (a) as the basis for negotiating with individual tribes.

(c) If BIA and a participating tribe/consortium disagree over the content of residual functions or amounts, a participating tribe/consortium may request the Deputy Commissioner to reconsider residual levels for particular programs.

(1) The Deputy Commissioner must make a written determination on the request within 30 days of receiving it;

(2) The tribe/consortium may appeal the Deputy Commissioner’s determination to the Assistant Secretary—Indian Affairs;

(3) The decision by the Assistant Secretary Indian Affairs is final for the Department.

(d) Information on residual functions may be amended if IRR Program functions are added or deleted, if statutory or final judicial determinations mandate, or if the Deputy Commissioner makes a determination that would alter the residual information or funding amounts.

May a Tribe/Consortium Finalize Negotiation of a Self-Determination Contract and Self-Governance Agreement Pending an Appeal of Residual Functions or Amounts?

Yes. Pending appeal of a residual function or amount, any tribe may decide to include funds in a contract or agreement using the residual information that is being appealed. The residual information will be subject to later adjustment based on the final determination of a tribe's appeal.

What Happens if a Tribe Disagrees With BIA About the Funding It Is Entitled To Be Paid?

Unless otherwise provided above, disagreements over the amount of funds that must be included in a contract or agreement shall be dealt with in accordance with the dispute resolution processes set out in 25 CFR 900.150 *et seq.* for self-determination contracts and 25 CFR 1000.95 and 1000.420 *et seq.* for self-governance agreements.

The Fiscal Year 1999 Omnibus Consolidated Appropriations Act provides that “not to exceed 6 percent of contract authority available to the Bureau of Indian Affairs from the Federal Highway Trust Fund *may be* used to cover the road program management costs of the Bureau * * *.” (Emphasis added.) The argument that this language permits BIA to automatically withhold 6 percent of these funds from tribes is flawed. First, the phrase “not to exceed 6 percent” makes it clear that Congress did not intend to grant BIA 6 percent of the funding for its administrative activities. Rather, Congress intended to grant the Bureau the funds that it needed for such activities, up to 6 percent. “Not to exceed 6 percent” implies not a grant of funds to BIA but rather a ceiling on the amount of funds that the agency is permitted to use for road program management costs. In light of the goals and purposes of the ISDEAA, it is logical that Congress would choose to impose a ceiling upon BIA's use of funds, intending that as much funding as possible be available to go directly to the tribes. Finally, the word “may” confirms that Congress had no intention of setting aside these funds exclusively for road program management costs.

Even to the extent that these funds are used for administrative costs, the statute does not even hint at the notion of “non-contractibility.” While the Federal Caucus contends that the 6 percent funds are reserved for and by BIA for non-contractible functions, the Omnibus Act imposes and the ISDEAA and TEA-21 permit no such priority. “Road program management costs” are not non-contractible by definition. In light of the fact that 23 U.S.C. 202(d)(3)(B) exists to clarify the fact that BIA administrative costs may be contracted or compacted by tribes, there is no

reason to believe that Congress intended to earmark these “up-to-6 percent” funds for non-contractible activities at all, and it certainly could not have intended to earmark them exclusively for non-contractible activities.

In the end, the most powerful testament to Congress' intent that the “up-to-6 percent” administrative funds be available to tribes on the same basis as all other funds is the statement of Senator John McCain, who worked on both the ISDEAA and on TEA-21. On March 10, 1998, Senator McCain testified regarding an amendment to “ISTEA” (the former name for TEA-21) that was almost identical to the current Act's modified section 202(d)(3)(A). The purpose of Senator McCain's testimony was to speak out against the possibility that “up to 6 percent of the Indian ISTEA funds will continue to be diverted to pay for a BIA bureaucracy * * * Congress has been trying to curb BIA bureaucracy and support tribal autonomy ever since 1975 when it first enacted the Indian Self-Determination Act, known as Public Law 93-638.” Senator McCain further testified as follows:

In the 1994 amendments to Public Law 93-638, the Congress intended to apply these authorities to all funds administered by BIA, including ISTEA funds transferred to BIA from the Department of Transportation for the benefit of Indian roads and bridges. [However, d]espite our clear references in Committee report and floor language that this was our intent, BIA has refused tribal efforts to fully subject all ISTEA funds to Public Law 93-638. This issue has consumed hundreds of hours of federal-tribal negotiations since 1994 * * *. ISTEA is the last major BIA account which BIA continues to protect as immune from the reach of tribal requests under Public Law 93-638 to obtain a direct transfer of the full tribal share of these funds * * *. [W]e in Congress intended the 1994 amendments to Public Law 93-638 to apply to ISTEA funds transferred to BIA from the Department of Transportation. They were to be treated like all other funds administered by BIA—if a tribe wanted to obtain its full share of funds directly, in a flexible and accountable contract or compact, it could do so. [Emphasis added.]

Can the “up-to-6 percent” administrative funds be used to fund IRR Program Management Systems and public hearings for IRR planning and projects? Two points of contention that have arisen serve to underscore the disagreement on these issues. Specifically, the Tribal and Federal Caucuses disagree as to whether the 6 percent funds may be used to fund IRR Program Management Systems and public hearings for IRR planning and projects. It is the tribal position that both of these activities are the types of

administrative functions for which the use of 6 percent administrative funds by a contracting or compacting tribe is perfectly appropriate.

In order to implement its views on these issues the Tribal Caucus proposed the following provisions:

How Are Public Hearings for IRR Planning and Projects Funded?

Transportation planning public hearings are funded by 2 percent planning or 6 percent administrative funds. Project public hearings are funded by construction funds.

How Are IRR Program Management Systems Funded?

IRR Program management systems shall be funded out of BIA's 6 percent.

How Will The IRR Management Systems Be Implemented?

A nationwide management system will be maintained and implemented by BIA Division of Transportation using IRR Program management funds. BIA Regional Offices will provide the database information for this nationwide system. Tribes may collect and provide this information in accordance with the terms of a self-determination contract or self-governance agreement.

23 U.S.C. 202(d)(3)(A), as modified by TEA-21, explicitly authorizes contracting and compacting tribes to receive funding for, and carry out, programs “specifically or functionally related to the cost of planning, research, engineering, and construction” that would otherwise be carried out by the Federal Government. Both IRR management systems and public hearings to plan for the implementation of IRR projects are clearly “related to the cost of planning, research, engineering, and construction” under TEA-21.

Section 202(d)(3)(B) specifically clarifies the fact that such funds are to include those necessary for the carrying-out of administrative functions: “Funds for programs, functions, services, and activities, or portions thereof, including supportive administrative functions that are otherwise contractible * * *, shall be paid in accordance with subparagraph (A) * * *.” Both public hearings and management systems are “supportive administrative functions” within the purview of this section.

Neither management systems nor public hearings are precluded from being contracted under the above-noted provisions, which reserve funds for functions that are “otherwise contractible.” The regulations for Title I of the ISDEAA define a non-contractible function as one that “includes activities that cannot be lawfully carried out by the contractor.” (25 CFR 900.22(e)). Other than illegal activities, such functions are limited to those that are

“inherently Federal”—i.e., either constitutionally non-delegable or necessarily vested in federal employees per the DOI Solicitor’s Opinion. Because neither management systems nor public hearings are “inherently Federal,” neither activity is inherently non-contractible.

Neither management systems nor public hearings may be defined up front in these regulations as “non-contractible.” Rather, their contractibility must be determined on a case-by-case basis. The regulations for Title IV of the ISDEAA definitively institute this requirement:

The Department will decide what functions are * * * inherently Federal on a case-by-case basis after consultation with the Office of the Solicitor. The Solicitor has ruled that inherently Federal functions cannot be defined and must be determined on a case-by-case basis * * *. (65 FR 78690, Dec. 15, 2000).

Finally, so long as these activities are contractible/compactible to tribes, the 6 percent administrative funds are available to tribes for carrying them out. It is clear from the legislative history that Congress intended the “up-to-6 percent administrative funds” transferred from the Department of Transportation to BIA to be wholly available to contracting and compacting tribes. Thus, because neither of the activities in dispute may be defined as “inherently Federal,” and because both are legally contractible, tribes are not only legally entitled to pay for them out of the 6 percent administrative funds, but both the ISDEAA and TEA–21 actually mandate that these funds be made available to tribes for that very purpose.

Federal View

The Federal Caucus believes that the issue of program management financing is a policy matter between BIA and FHWA. BIA is an agency within DOI. Unlike other program areas within BIA, BIA’s Division of Transportation (BIA DOT) has no general appropriations through DOI for administering the IRR Program. All of BIA DOT’s funding for administration of the IRR Program comes from the Highway Trust Fund. BIA DOT’s only source of funds to carry out its responsibilities is the “not to exceed 6 percent” of the total funds transferred from FHWA to BIA DOT for program management and oversight. The Federal list of IRR Program management activities is set forth in this section. All of this work is performed by BIA DOT central or regional offices. Costs for this work comes from the “not

to exceed 6 percent” funds FHWA transfers to BIA DOT.

By way of background, since fiscal year 1990, BIA annual construction appropriation has provided that “not to exceed 6 percent of the contract authority available to BIA from the Federal Highway Trust Fund may be used to cover the *road program management costs* of the Bureau.” (Emphasis added.) On December 28, 1999, in written response to questions presented by the Senate Committee on Indian Affairs, the Assistant Secretary—Indian Affairs stated that this 6 percent limitation applies only to the management and oversight activities associated with non-project functions and that the 6 percent limitation does not apply to project-related costs of the IRR Program. This statement affirmed the longstanding BIA policy to use the 6 percent management and oversight funds to carry out the Federal Government’s oversight and trust responsibilities associated with the IRR Program.

Congress has not further defined the term “road program management costs” in the Department of Interior Annual Appropriation Acts. However, in a 1997 survey of state non-project expenditures, FHWA determined that States spent approximately 5.5 percent of their general funds for non project-related program management costs to administer the Federal-aid construction program. Accordingly, BIA has used the 6 percent for non-project related costs in a manner consistent with the states’ expenditures. BIA determined that because the States did not charge non-project expenditures to a specific project, the 6 percent road program management costs should similarly be limited to non-project related program management expenditures.

In an opinion to the General Accounting Office dated July 12, 2000, the former Department of the Interior Solicitor concluded that FHWA’s and BIA’s administrative use of the term “road program management funds” is reasonable. The General Accounting Office concurred in this opinion in a report dated August 14, 2000.

There is also statutory support for this interpretation. Title 23 U.S.C. 202 (d)(3)(B) states that only funds for programs, functions, services or activities or portions thereof, including supportive administrative functions that are otherwise contractible, shall be paid to tribes. The Federal Government has interpreted this provision to mean that all noncontractible activities in the IRR Program have to be funded using either the 6 percent program management funds or project funds. In short,

Congress has directed the Secretary to use a percentage of the IRR funds to carry out these program management activities.

It is also important for the integrity and effective administration of the IRR Program that the use of program management funds be consistent throughout the twelve BIA regions. To negotiate a new list administrative responsibilities for each self-determination contract or self-governance agreement is inefficient and generates unnecessary costs to both tribes and

BIA. Moreover, to have a list of noncontractible items is consistent with 25 CFR 1000.243 under which the agreement must specify the services to be provided, the work to be performed, and the responsibilities of the tribe and the Secretary.

BIA has never viewed the 6 percent program management costs as a ceiling to use the entirety of these funds. Clearly, since the DOI Appropriations Act establishes an upper limit of 6 percent, BIA is obligated to make the remaining funds available for construction. It has been the Secretary of Interior’s and the Secretary of Transportation’s longstanding practice to maximize the amount of IRR funding for construction activities by redistributing the unused portion of the 6 percent funds to projects at the regional level.

Project-Related Management Costs

BIA receives funds for project-related management expenses from the Highway Trust Fund rather than from BIA’s annual appropriations for operating Indian programs or for construction. FHWA funds projects based on its approval of a Transportation Improvement Program (TIP). See 23 U.S.C. 204(a)(3). Based on FHWA-approved TIPS, FHWA allocates funds to BIA for IRR Program activities. The applicable statute, 23 U.S.C. 204(b), states that project-related costs are eligible for IRR funding. “Funds available for * * *. Indian reservation roads shall be used by the Secretary * * * to pay for the cost of transportation planning, research, engineering, and construction of the highways, roads, and parkways * * *.”

Neither BIA annual road maintenance appropriation nor BIA construction appropriation account may be used for IRR construction. Therefore, BIA has no discretion to use these funds to manage the IRR (Highway Trust Fund) construction program. See *Principles of Federal Appropriations*, Second Edition, Chapter Two, Part B, 1991 WL 645709, “If a specific appropriation

exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation.”

Finally, the Secretary remains responsible for ensuring that health and safety standards are met on all IRR construction projects. For example, those projects administered by self-governance tribes are subject to the requirements of section 403 (e)(2) of Public Law 93–638, which provides “[i]n all construction projects performed pursuant to this part, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.” Since the only funds available for IRR projects come from the IRR Program, 25 CFR 1000.256 directs that the Secretary must retain project funds to ensure proper health and safety standards in construction projects.

In addition, 25 CFR 900.131 and 1000.256 outlines additional requirements that the Secretary must perform in order to ensure health and safety, such as approving construction standards and monitoring design and construction. This includes the Secretary’s monitoring for health and safety not only during the design phase, but also during actual construction and the review of the construction plans and specifications.

The Federal proposal is as follows:

What IRR Program Functions May Be Assumed by a Tribe in a Self-determination Contract or Self-Governance Agreement?

All IRR functions and activities that are otherwise contractible may be included in a self-determination contract or self-governance agreement. (23 U.S.C. 202(d)(3)(B)).

What IRR Project and Program Functions Are Not Otherwise Contractible?

The following IRR functions or activities are non-contractible:

(a) IRR project-related pre-contracting activities:

- (1) Notifying tribes of available funding including the right of first refusal; and
- (2) Providing technical assistance.

(b) IRR project-related contracting activities:

- (1) Providing technical assistance;
- (2) Reviewing all scopes of work (25 CFR 900.122);
- (3) Evaluating proposals and making declination decisions, if warranted;
- (4) Performing declination activities;
- (5) Negotiating and entering into contracts or agreements with state, tribal, and local governments and other Federal agencies;
- (6) Processing progress payments or contract payments;
- (7) Approving contract modifications;
- (8) Processing claims and disputes with tribal governments; and
- (9) Closing out contracts or agreements.

(c) Planning activities:

(1) Reviewing IRR transportation improvement programs developed by tribes or other contractors;

(2) Reviewing IRR long-range transportation plans developed by tribes or other contractors; and

(3) Performing other Federal responsibilities identified in the IRR Transportation Planning Procedures and Guidelines manual.

(d) Environmental and historical preservation activities:

(1) Reviewing and approving all items required for environmental compliance; and

(2) Reviewing and approving all items required for archaeological compliance.

(e) Processing rights-of-way:

(1) Reviewing rights-of-way applications and certifications;

(2) Approving rights-of-way documents;

(3) Processing grants and acquisition of rights-of-way requests for tribal trust and allotted lands under 25 CFR 169;

(4) Responding to information requests;

(5) Filing Affidavit of Completion Forms; and

(6) Performing custodial functions related to storing right-of-way documents.

(f) Conducting project development and design under 25 U.S.C. 900.131:

(1) Participating in the plan-in-hand reviews as facility owner;

(2) Reviewing and/or approving plans, specifications, and cost estimates (PS&E’s) for health and safety assurance as facility owner;

(3) Reviewing PS&E’s to assure compliance with all other Federal laws; and

(4) Reviewing PS&E’s to assure compliance with or exceeding Federal standards for IRR design and construction.

(g) Construction:

(1) Making application for clean air/clean water permits as facility owner;

(2) Ensuring that all required state/tribal/Federal permits are obtained;

(3) Performing quality assurance activities;

(4) Conducting value engineering activities as facility owner;

(5) Negotiating with contractors on behalf of Federal Government;

(6) Approving contract modifications/change orders;

(7) Conducting periodic site visits;

(8) Performing all Federal Government required project-related activities contained in the contract documents and required by 25 CFR parts 900 and 1000;

(9) Conducting activities to assure compliance with safety plans as a jurisdictional responsibility (hazardous materials, traffic control, OSHA, etc.);

(10) Participating in final inspection and acceptance of project documents (as-built drawings) as facility owner; and

(11) Reviewing project closeout activities and reports.

(h) Other activities:

(1) Performing other non-contractible required IRR project activities contained in this part, part 900 and part 1000; and

(2) Other Title 23 non-project-related management activities.

(i) BIA Division of Transportation program management:

(1) Developing budget on needs for the IRR Program;

(2) Developing legislative proposals;

(3) Coordinating legislative activities;

(4) Developing and issuing regulations;

(5) Developing and issuing IRR planning, design, and construction standards;

(6) Developing/revising interagency agreements;

(7) Developing and approving IRR stewardship agreements in conjunction with FHWA;

(8) Developing annual IRR obligation and IRR Program accomplishments reports;

(9) Developing reports on IRR project expenditures and performance measures for the Government Performance and Results Act (GPRA);

(10) Responding to/maintaining data for congressional inquiries;

(11) Developing and maintaining funding formula and its database;

(12) Allocating IRR Program and other transportation funding;

(13) Providing technical assistance to tribe/tribal organizations/agencies/regions;

(14) Providing national program leadership for: National Scenic Byways Program, Public Lands Highways Discretionary Program, Transportation Enhancement Program, Tribal Technical Assistance Program, Recreational Travel and Tourism, Transit Program, ERFO Program, Presidential initiatives (Millennium Trails, Lewis & Clark, Western Tourism Policy Group);

(15) Participating in and supporting tribal transportation association meetings such as the Intertribal Transportation Association regional and national meetings;

(16) Coordinating with and monitor Tribal Technical Assistance Program centers;

(17) Planning, coordinating, and conducting BIA/tribal training;

(18) Developing information management systems to support consistency in data format, use, etc., with the Secretary of Transportation for the IRR Program;

(19) Participating in special transportation related workgroups, special projects, task forces and meetings as requested by tribes;

(20) Participating in national transportation organizations, such as the Western Association of State Highway and Transportation Officials, American Association of State Highway and Transportation Officials, National Association of County Engineers, and Transportation Research Board;

(21) Participating in and supporting FHWA Coordinated Technology Improvement program;

(22) Participating in national and regional IRR Program meetings;

(23) Consulting with tribes on non-project related IRR Program issues;

(24) Participating in IRR Program, process, and product reviews;

(25) Developing and approve national indefinite quantity service contracts;

(26) Assisting and supporting the IRR Coordinating Committee;

(27) Processing IRR Bridge program projects and other discretionary funding applications or proposals from tribes;

(28) Coordinating with FHWA;

(29) Performing stewardship of the IRR Program;

(30) Performing oversight of the IRR Program and its funded activities; and

(31) Performing any other non-contractible IRR Program activity included in this part.

(j) BIA DOT Planning:

(1) Maintaining the official IRR inventory;
(2) Reviewing long-range transportation plans;

(3) Reviewing and approving IRR transportation improvement programs;

(4) Maintaining nationwide inventory of IRR strip and atlas maps;

(5) Coordinating with tribal/state/regional/local governments;

(6) Developing and issuing procedures for management systems;

(7) Distributing approved IRR transportation improvement programs to BIA regions;

(8) Coordinating with other Federal agencies as applicable;

(9) Coordinating and processing the funding and repair of damaged Indian reservation roads with FHWA;

(10) Calculating and distributing IRR transportation planning and Atlas mapping funds to BIA regions;

(11) Reprogramming unused IRR transportation planning and Atlas mapping funds at the end of the fiscal year;

(12) Monitoring the nationwide obligation of IRR transportation planning and Atlas mapping funds;

(13) Providing technical assistance and training to BIA regions and tribes;

(14) Approving Atlas maps;

(15) Reviewing IRR inventory information for quality assurance; and

(16) Advising BIA regions and tribes of transportation funding opportunities.

(k) BIA DOT engineering:

(1) Participating in the development of design/construction standards with FHWA;

(2) Developing and approving design/construction/maintenance standards;

(3) Conducting IRR Program/product reviews; and

(4) Developing and issuing criteria for pavement and congestion management systems.

(l) BIA DOT responsibilities for bridges:

(1) Maintaining BIA National Bridge Inventory information/database;

(2) Conducting quality assurance of the bridge inspection program;

(3) Reviewing and processing IRR Bridge program applications;

(4) Participating in second level review of IRR bridge PS&E; and

(5) Developing criteria for bridge management systems.

(m) BIA DOT responsibilities to perform other non-contractible required IRR Program activities contained in this part;

(n) BIA regional offices program management:

(1) Designating IRR system roads;

(2) Notifying tribes of available funding;

(3) Developing state IRR transportation improvement programs;

(4) Providing FHWA-approved IRR transportation improvement programs to tribes;

(5) Providing technical assistance to tribes/tribal organizations/agencies;

(6) Funding common services as provided as part of the region/agency/BIA Division of Transportation IRR costs;

(7) Processing and investigating non-project related tort claims;

(8) Preparing budgets for BIA regional and agency IRR Program activities;

(9) Developing/revising interagency agreements;

(10) Developing control schedules/Transportation Improvement Programs;

(11) Developing regional IRR stewardship agreements;

(12) Developing quarterly/annual IRR obligation and program accomplishments reports;

(13) Developing reports on IRR project expenditures and performance measures for Government Performance and Results Act (GPRA);

(14) Responding to/maintaining data for congressional inquiries;

(15) Participating in Indian transportation association meetings such as Intertribal Transportation Association regional and national meetings;

(16) Participating in Indian Local Technical Assistance Program (LTAP) meetings and workshops;

(17) Participating in BIA/tribal training development (highway safety, work zone safety, etc.);

(18) Participating in special workgroups, task forces, and meetings as requested by tribes (tribal members and BIA region/agency personnel);

(19) Participating in national transportation organizations meetings and workshops;

(20) Reviewing Coordinated Technology Improvement program project proposals;

(21) Consulting with tribal governments on non-project related program issues;

(22) Funding costs for common services as provided as part of BIA IRR region/agency/contracting support costs;

(23) Reviewing and approving IRR Atlas maps;

(24) Processing Freedom of Information Act (FOIA) requests;

(25) Monitoring the obligation and expenditure of all IRR Program funds allocated to BIA region;

(26) Performing activities related the application for ERFO funds, administration, and oversight of such funds; and

(27) Participating in IRR Program, process, and product reviews.

(o) BIA DOT regional offices planning:

(1) Coordinating with tribal/state/regional/local government;

(2) Coordinating and processing the funding and repair of damaged Indian reservation roads with tribes;

(3) Reviewing and approving IRR Inventory data;

(4) Maintaining, reviewing, and approving the management systems databases;

(5) Reviewing and approving IRR state transportation improvement programs; and

(6) Performing Federal responsibilities identified in the IRR Transportation Planning Procedures and Guidelines manual.

(p) BIA DOT regional offices engineering:

(1) Approving tribal standards for the IRR Program use;

(2) Developing and implementing new engineering techniques in the IRR Program; and

(3) Providing technical assistance.

(q) BIA DOT regional offices responsibilities for bridges:

(1) Reviewing and processing IRR bridge program applications;

(2) Reviewing and processing IRR bridge inspection reports and information; and
(3) Ensuring the safe use of roads and bridges.

(r) BIA DOT regional offices other responsibilities for performing other non-contractible required IRR Program activities contained in this part.

How Are the IRR Non-Contractible Program and Project Functions Funded?

(a) All non-contractible program functions are funded by IRR Program management and oversight funds; and

(b) All non-contractible project functions are funded by the IRR project construction funds.

May Tribes Include the Cost for Contractible Supportive Administrative Functions in Their Budgets?

Yes. Tribes may use IRR project funds contained in their contracts or annual funding agreements for contractible supportive administrative functions.

How Does BIA Determine the Amount of Funds Needed for Non-Contractible Non-Project Related Functions?

Each fiscal year the Secretary will develop a national and regional BIA IRR Program budgets. Within the first quarter of each fiscal year the Secretary will send a copy of the national IRR budget and BIA regional IRR budget to all tribes.

Are the Unused IRR Program Management Funds Reserved by the Secretary Considered Residual Funds?

No. The unused IRR Program management funds reserved by the Secretary are not considered residual funds.

What Happens to the Unused Portion of IRR Program Management Funds Reserved by the Secretary?

Any unused IRR Program management funds are distributed to BIA regions using the IRR Relative Need Formula and are used for additional construction activities.

Management Systems

It is appropriate for BIA to use IRR Program management funds for developing nationwide management systems because all tribes benefit. Using these funds for developing individual tribal management systems is not appropriate since only one tribe benefits. Data collection for management systems is basically a transportation planning activity and thus should be funded using either the 2 percent IRR tribal transportation planning or IRR construction funds.

The Federal proposal is as follows:

How Are IRR Program Management Systems Funded?

BIA funds IRR Program management systems to develop the nationwide IRR

Program management systems. If a tribe elects not to use the nationwide system, it may develop a tribal management system using the 2 percent IRR tribal transportation planning or IRR construction funds.

How Will the IRR Management Systems Be Implemented?

BIA Division of Transportation (BIA DOT) implements and maintains nationwide IRR management systems using IRR Program management funds. For direct service tribes that chose not to contract, BIA regional offices will provide the database information for these nationwide systems using IRR construction funds. A tribe may collect and must provide this information to the BIA regional office using IRR construction funds or 2 percent IRR tribal transportation planning funds under a self-determination contract or self-governance annual funding agreement.

Public Hearings

Funding for public hearings during project planning processes differs for tribes and for BIA. It is appropriate for tribes to use the 2 percent IRR tribal transportation planning funds or IRR construction funds for public hearings during the project planning process since conducting public hearings for approval of a long-range plan or TIP is part of the transportation planning process. BIA cannot use the 2 percent IRR tribal transportation planning funds, so IRR construction funds are the only funds available for it to use to conduct public hearings. Conducting public hearings during design of construction projects is a project related activity; therefore IRR construction funds should be used to pay for these hearings.

The Federal proposal is as follows:

How Are Public Hearings for IRR Planning and Projects Funded?

Public hearings for IRR planning and projects are funded as follows:

- (a) Public hearings for IRR planning:
 - (1) Public hearings for TIPS and long-range transportation plans conducted by tribes are funded using the 2 percent IRR transportation planning or IRR construction funds; and
 - (2) Public hearings for the IRR TIP and long-range transportation plans conducted by BIA are funded using IRR construction funds.
- (b) Public hearings for IRR projects conducted by either tribes or BIA are funded using IRR construction funds.

L. Availability of Contract Support Funding—Subpart E

The issue is how contract support funds are made available to tribes under self-determination contracts and self-governance agreements. The Federal text is inserted at § 170.635–636.

Tribal View

The Tribal Caucus believes that contract support funding should be made available under self-determination contracts and self-governance agreements in a manner consistent with

the ISDEAA. Currently, the Interior Department is required to make contract support funding available for such contracts and agreements in accordance with sections 106(a) and 403 of the ISDEAA. However, the Interior Department has not extended this requirement to IRR Program activities assumed under such contracts and agreements.

The Tribal Caucus proposes the following regulatory provision to clarify that contract support costs funds are to be included for IRR Program activities assumed under self-determination contracts and self-governance agreements.

Are Contract Support Funds Available for IRR Program Activities Performed Under Public Law 93–638 Contracts?

Yes, in accordance with sections 106(a)(3) and 403 of Public Law 93-638 contract support funds are available.

Federal View

It is the position of the Federal Caucus that the issue of contract support funding is not appropriate for inclusion in this rule or for public comment since this is a matter in litigation.

The Federal view is that contract support costs are an eligible item for IRR Program funding and need to be included in the cost estimates submitted by tribes. Thus, contract support costs may be paid from IRR Program funds. Contract support funds are also provided in the Secretary's appropriations. The Secretary's appropriations are not available for DOT's IRR Program, which is a separate appropriation.

The Federal proposal is as follows:

Are Contract Support Funds Provided in Addition to the 2 Percent (2%) IRR Transportation Planning Funds?

Contract support costs are an eligible item out of the tribes' IRR Program funds allocation and need to be included in a tribe's budget.

May Contract Support Costs for IRR Construction Projects Be Paid Out of Department of the Interior or BIA Appropriations?

No.

M. Savings—Subpart E

The issue is whether tribes performing under self-determination contracts or self-governance agreements may keep savings. The Federal text is inserted at § 170.620.

Federal View

The Federal Caucus believes this issue has been resolved by legislation and is therefore not an appropriate area

for public comment or inclusion in this rule.

Congress changed the provision in Public Law 93–638 regarding savings in 1998 to read as follows:

“Beginning in fiscal year 1998, and thereafter, where the actual costs of construction projects under self-determination contracts, compacts, or grants, pursuant to Public Law 93–638, 103–413, or 100–297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the appropriate Secretary after consultation with the tribes.”

Thus, the Federal proposal is as follows:

Can Indian Tribes and Tribal Organizations Performing Under Self-determination Contracts of Self-governance Agreements Keep Savings That Result From Their Administration of IRR Projects or an Entire Tribal IRR Program?

Pursuant to 25 U.S.C. 450e-2, where the actual costs of the contracts or agreements for construction projects are less than the estimated costs, use of the resulting excess funds shall be determined by the Secretary after consultation with the tribes.

Tribal View

The Tribal Caucus' view is that this question and answer improperly limit a tribe's discretion to use savings associated with IRR projects or programs. The Federal Caucus' question and answer are narrowly drafted based on 25 U.S.C. 450e-2, which provides that, for construction projects whose actual costs are less than the estimated costs, the Secretary is to determine how to use the excess funds after consulting with the tribes. There are several problems with the Federal proposal to use this statutory language as the basis for a question-and-answer limiting a tribe's or tribal organization's ability to use savings.

First, this statutory language is focused on construction projects and does not address non-construction IRR activities. Thus, savings from non-construction activities are not subject to the Secretary's discretion as to how they can be used.

Second, this statutory provision was included as a rider to an Interior and Related Agencies Appropriation Act in 1998 and thus applies only to funds appropriated under that Act, not to funds appropriated under TEA–21 or under the Department of Transportation's appropriations.

Third, the legislative history discussing this provision clarifies that it was intended to apply to funds appropriated by Congress for school construction activities, all of which are

appropriated under the Department of the Interior's appropriations.

Fourth, Title I and Title IV of the ISDEAA contain provisions that provide tribes and tribal organizations with considerably more flexibility and control over decisions associated with savings resulting from those agreements than over the reading of 25 U.S.C. 450e-2 that the Federal Caucus has incorporated into its proposed question and answer. (See, for example, 25 U.S.C. 450j(a)(4); 450l(c)(§ 1(d)(9)). With respect to Title IV self-governance agreements, tribes may opt, in accordance with 25 U.S.C. 458cc(l), to incorporate any provision of Title I in a self-governance agreement, including provisions that allow flexibility associated with savings.

Finally, and most importantly, in the recently published regulations implementing Title IV of the ISDEAA (25 CFR part 1000), the Department of the Interior enacted the following regulation regarding savings:

Section 1000.400 Can a Tribe/ Consortium Retain Savings From Programs?

Yes. For BIA programs, the tribe/ consortium may retain savings for each fiscal year during which an AFA is in effect. A tribe/consortium must use any savings that it realizes under an AFA, including a construction contract:

- (a) To provide additional services or benefits under the AFA; or
- (b) As carryover; and
- (c) For purposes of this subpart only, programs administered by BIA using appropriations made to other Federal agencies, such as the Department of Transportation, will be treated in accordance with paragraph (b) of this section.

The Tribal Caucus believes that the Department must implement a similarly flexible provision relating to savings in these regulations. Accordingly, the Tribal Caucus has proposed the following two provisions to address this issue:

Can an Indian Tribe or Tribal Organization Performing Under a Self-determination Contract or Self-governance Agreement Keep Savings That Result From its Administration of IRR Project(s) or an IRR Program?

Yes. An Indian tribe or tribal organization may retain savings for each fiscal year for which a contract or agreement is in effect. A tribe or tribal organization must use any savings that it realizes under a contract or agreement, including a construction contract or agreement:

- (a) To provide additional services or benefits under the contract or agreement; or
- (b) As carryover.

Can an Indian Tribe or Tribal Organization Performing Under a Self-determination Contract or Self-governance Agreement Keep Profits Resulting From the Administration of IRR Project(s) or an Entire Tribal IRR Program?

Yes. Indian tribes and tribal organizations may use without restriction profits resulting from an IRR project or program performed under a fixed-price self-determination contract or a self-governance agreement.

IV. Procedural Requirements

A. Regulatory Planning and Review (Executive Order 12866)

This proposed rule is a significant regulatory action because it will have an annual effect of \$100 million or more on the economy. Funding for the IRR Program in fiscal year 2001 is \$275 million and is expected to increase in future years. The Department of Transportation, FHWA, allocates funds to the Department of the Interior, Bureau of Indian Affairs. The Bureau of Indian Affairs distributes the funds to each of its 12 regions based on the existing funding formula for the benefit of tribes in each region. The Office of Management and Budget has reviewed this proposed rule under Executive Order 12866.

This proposed rule will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. This rule sets forth policies and guidelines under which Federal Lands Highway Administration, Bureau of Indian Affairs, and tribes that contract with the Bureau of Indian Affairs conduct the IRR Program. It also proposes a funding methodology for distributing IRR Program funds.

It covers current practices of DOT and DOI. DOT representatives have participated in this negotiated rulemaking, concur in all consensus items, and have provided comments on all disputed items.

This proposed rule does not alter the budgetary effects or entitlement, grants, user fees, or loan programs or the rights or obligations of their recipients.

This proposed rule raises novel legal or policy issues that are contained in the Disagreement Items section of the Preamble. It also provides policy and guidance under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, and under the Transportation Equity Act for the 21st Century, Public Law 105-178, as they relate to the IRR Program which has been in effect since 1983.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Indian tribes are not considered to be small entities for purposes of this Act.

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This proposed rule is a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)) because it has an annual effect on the economy of \$100 million or more. The yearly amount of IRR funds is approximately \$275 million.

This proposed rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. ≤ Actions under this proposed rule will distribute Federal funds to Indian tribal governments and tribal organizations for transportation planning, construction, and maintenance.

This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532).

E. Takings Implication Assessment (Executive Order 12630)

This proposed rule does not have significant "takings" implications. This proposed rule does not pertain to "taking" of private property interests, nor does it impact private property.

F. Federalism (Executive Order 12612)

This proposed rule does not have significant federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

G. Civil Justice Reform (Executive Order 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This proposed regulation requires an information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995, Public Law 104-13, is required. An OMB form 83-I has been reviewed by the Department and sent to the Office of Management and Budget (OMB) for approval. As part of the Department's ongoing effort to reduce paperwork burdens, the Department invites the general public to take this opportunity to comment to OMB on the information collections contained in this proposed rulemaking, as required by the Paperwork Reduction Act. Such comments should be sent to the following address: Attention—Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 27th Street, NW., Washington, DC 20503. Please also send

a copy of your comments to the Department at the location noted under the heading **ADDRESSES**. OMB has up to 60 days to approve or disapprove the information collections but may respond after 30 days; therefore, public comments to OMB should be submitted within 30 days in order to assure their maximum consideration. Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the BIA, including whether the information shall have practical utility; (2) the accuracy of the BIA's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. The information collection will be used to enable the BIA to better administer

the Indian Reservation Roads Program. In all instances, the Department has strived to lessen the burden on the constituent public and ask for only that information that is absolutely essential to the appropriate administration of the programs affected and in keeping with the Department's fiduciary responsibility to federally-recognized tribes.

A synopsis of the information collection burdens for regulatory revision are provided below. The explanatory summary of each information collection section identified will indicate what measurable standard has been used as a baseline for further calculations of burden hours and operations and maintenance costs to the government. Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

ESTIMATED BURDEN HOURS

CFR section	Number of respondents	Responses per respondent	Burden per response (hours)	Total annual burden (hours)
170.252 Provide application	557	1	4	2,228
170.285 Provide request	557	1	2	1,114
170.296 Record review	557	1	1	557
170.302 Form requirement	557	1	4	2,228
170.413 Reporting requirement	557	1	2	1,114
170.418 Reporting requirement	557	1	1	557
170.428 Form requirement	557	1	40	22,280
170.441 Posting requirement	557	1	½	278
170.442(b) Recordkeeping req.	557	1	1	557
170.467 Provide info. for exception	557	1	1	557

[**Note:** For purposes of this part only, we have used the number 557 as the number of federally-recognized respondent tribes that could possibly file for benefits under the Indian Reservation Roads program. The cost of reporting and recordkeeping by the public is estimated to be approximately \$10/. We have used this figure as a medium figure that would indicate the cost of a tribal official or his/her representative in typing a form, submitting information for BIA review, compiling reports from information gathered from outside sources, and other miscellaneous costs that may be associated with obtaining the information needed to fulfill this part's information collection requirements. Only federally-recognized tribes and their employees would be involved in this information collection activity.]

Summary

170.252 What Must an Application for an IRRHPP Include?

This section describes what information must be included in an IRRHPP application. While much of this information resides within the Bureau of Indian Affairs, some tribal effort will be expended in formulating its grant justification in addressing ranking criteria. We estimate that it would take tribal officials 4 hours to compile this information for BIA review, including the time required to have the action documented by an authorized tribal official through letter, resolution or similar facility.

Burden hours = $4 \times 557 = 2,228$ hours at a cost of \$22,280 to the public.

170.285 May a Tribe Challenge the Cost-to-Construct, Vehicle Miles Traveled, and Population Data BIA Uses in the Relative Need Distribution Factor?

This section allows the tribe to request that the Regional Director revise the data that the BIA uses in the Relative Need Distribution Factor. This entails tribal submission of a request which includes relevant data that would allow the Regional Director to revise such data. Supporting data included in this request could take up to 2 hours to compile and format into a formal request.

Burden hours = $557 \times 2 = 1,114$ hours at a cost of \$11,140 to the public.

170.296 How Is the IRR Inventory Kept Accurate and Correct?

This section details the effort expended to update the IRR Inventory data on an annual basis. While this is largely a BIA function, the tribes may review this data and submit a request to provide for errors or omissions to the IRR Inventory. We estimate that this tribal review and submission would take approximately 1 hour.

Burden hours = $557 \times 1 = 557$ hours and a cost of \$5,570 to the public.

170.302 What Are the Minimum Requirements for a Tribe's LRTPs?

This section illustrates the items needed to support a transportation plan. While no form exists, the requirements for supporting the transportation plan are enumerated. The compilation of

this information involves tribal review of its existing records, inventory data, strategies for meeting its transportation need, coordination efforts with other agencies as appropriate, and official endorsement from the designated tribal official. We estimate that this review and compilation of documents to complete a LRTP would take approximately 4 hours.

Burden hours = $557 \times 4 = 2,228$ hours at a cost of \$22,280 to the public.

170.413 What Is the Tribal Transportation Improvement Program (TTIP)?

This section requires the tribe to submit a Tribal Transportation Improvement Program to the BIA by tribal resolution or tribally authorized government action for inclusion into the IRR TIP. The tribal official tasked with submitting this report must ensure that the TTIP is consistent with the tribal long-range transportation plan and must contain all Indian Reservation Roads funded projects. We estimate that it would take the responsible tribal official approximately 2 hours to complete this task, including the time needed to submit the TTIP to the Bureau of Indian Affairs.

Burden hours = $557 \times 2 = 1,114$ hours at a cost of \$11,140 to the public.

170.418 What Is the Tribal Priority List?

This section describes the tribal priority list as a list of transportation projects which the tribe or tribal organization wants funded. The list is not financially constrained. The tribal government submits this listing to the BIA by official tribal action which we estimate would take 1 hour, including the time needed to identify tribal projects for inclusion.

Burden hours = $557 \times 1 = 557$ hours at a cost of \$5,570 to the public.

170.428 What May a Long-Range Transportation Plan Include?

This section illustrates what items may be included in a tribal long-range transportation plan. While there is no official form for this submission, the section describes how various documents may be included. This task includes compiling information on transportation modes and routes, trip generation studies, social and economic planning documents, measures that address health and safety, review of existing transportation systems, cultural preservation planning documents, scenic byways and tourism plans, measures that address energy conservation considerations, a prioritized list of short-term

transportation needs, and an analysis of funding alternatives to implement plan recommendations. This is the most comprehensive of the information collection requirements in this part and we estimate that the tribe would spend an average of 40 hours (or 5 working days) to complete this task.

Burden hours = $557 \times 40 = 22,280$ hours and a cost of \$222,800 to the public.

170.441 How Must BIA or a Tribe Inform the Public When a Hearing Is Held?

This section describes the minimum standards for posting a public notice for hearings concerning the IRR. Since the tribes are already familiar with posting requirements for any number of meetings and public consultations, we estimate that the burden would not exceed $\frac{1}{2}$ hour for each posting.

Burden hours = $557 \times \frac{1}{2} = 278$ hours at a cost of \$2,780 to the public.

170.442 How Is a Public Hearing Conducted?

Paragraph (b) of this section requires a Record of hearing. The presiding official is responsible for compiling the official record of the hearing. A record of a hearing is a summary of oral testimony and all written statements submitted at the hearing. Additional written comments will be added to the record as appropriate. As the tribes are already familiar with record of hearing requirements for other public meetings and consultations, we estimate that the burden would not exceed 1 hour for each hearing.

Burden hours = $557 \times 1 = 557$ hours at a cost of \$5,570 to the public.

170.467 When Can a Tribe Request an Exception From the Design Standards?

This section describes what the engineer of record must submit to request an exception from the design standards in Appendix B of this subpart. The documentation required would include appropriate supporting data, sketches, details, and a justification based on engineering analysis. We estimate that an experienced engineer could compile the necessary documents and make a justification for an exemption within 1 hour.

Burden hours = $557 \times 1 = 557$ hours at a cost of \$5,570 to the public.

I. National Environmental Policy Act

The Department has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental

Policy Act of 1969 (42 U.S.C. 4321). Specific projects under the IRR Program will require NEPA review through an Environmental Assessment or Environmental Impact Statement.

J. Consultation and Coordination With Indian Tribal Governments (Executive Order 13175)

Pursuant to Executive Order 13175 of November 6, 2000, "Consultation and Coordination with Indian Tribal Governments," we have consulted with tribal representatives throughout the negotiated rulemaking process of developing this rule. We conducted consultation at the Negotiated Rulemaking Committee's 23 meetings, accepted oral and written comments at all Committee meetings, maintained Committee information on the IRR web site, provided periodic newsletter and other mailings, provided updates at other transportation related meetings, and sent periodic letters to tribal leaders. We have evaluated any potential effects on federally recognized Indian tribes and have determined that there are no potential adverse effects. The proposed rule expands tribal participation in and responsibilities for various transportation-related activities of the IRR program. We are continuing to consult with tribal governments and tribal organizations as part of the negotiated rulemaking process throughout the comment period after publication of this proposed rule.

K. Clarity of This Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. In addition to the comments requested above, we invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the rule?

(5) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 'C' Street, NW., Washington, DC 20240. You may

also e-mail comments concerning the Department's handling of Executive Order 12866 in this rulemaking to this address: *Exsec@ios.doi.gov*.

Rulemaking Analysis and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to the late comments, we will also continue to file relevant information in the docket as it becomes available after the comment closing date. Interested persons should continue to examine the docket for new material.

List of Subjects in 25 CFR Part 170

Highways and roads, Indians-lands.

Dated: July 18, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to revise 25 CFR part 170 as follows:

PART 170—INDIAN RESERVATION ROADS PROGRAM

Subpart A—General Provisions and Definitions

Sec.

- 170.1 What is the authority for this part?
- 170.2 What is the purpose and scope of this part?
- 170.3 What is the Federal Government's Indian Reservation Roads policy?
- 170.4 Do other requirements apply to the IRR Program?
- 170.5 What is the effect of these regulations on existing tribal rights?
- 170.6 What are definitions used in this part?

Subpart B—Indian Reservation Roads Program Policy and Eligibility

Consultation, Collaboration, Coordination

- 170.100 What does "consultation, collaboration, and coordination" mean?
- 170.101 What is the IRR Program consultation and coordination policy?
- 170.102 How do the Departments consult, collaborate, and coordinate with tribal governments?
- 170.103 What goals and principles guide the Secretaries?
- 170.104 Does the Secretary of the Interior consult with tribal governments during the formulation of the annual BIA budget process?

- 170.105 Must the Secretary consult with tribal governments before spending IRR funds?
- 170.106 What funds are available for consultation, collaboration, and coordination activities?
- 170.107 When must State governments consult with tribes and tribal organizations?
- 170.108 Should planning organizations and local governments consult with tribal governments when conducting planning for transportation projects?
- 170.109 How do the Secretaries prevent discrimination or adverse impact?
- 170.110 How can State and local governments prevent discrimination or adverse impact?
- 170.111 What can a tribe do if discrimination or adverse impacts occur?
- 170.112 How can tribes and State and government agencies enhance consultation, collaboration, and coordination?

Eligibility for IRR Funding

- 170.114 What activities may be funded with IRR funds?
- 170.115 What activities are not eligible for IRR Program funding?
- 170.116 How can a tribe determine whether a new proposed use of IRR funds is allowable?

Use of IRR and Cultural Access Roads

- 170.120 What restrictions apply to the use of an Indian Reservation Road (IRR's)?
- 170.121 What is a cultural access road?
- 170.122 Who may designate a road as a cultural access road?
- 170.123 May cultural access roads be included in the IRR Inventory?
- 170.124 What is the significance of designating a road as a cultural access road?
- 170.125 Can a tribe close a cultural access road?
- 170.126 Can a tribe designate a non-tribal road a cultural access road?

Seasonal Transportation Routes

- 170.130 What are seasonal transportation routes?
- 170.135 Can IRR Program funds be used to build seasonal transportation routes?
- 170.136 Can seasonal transportation routes be included in the IRR system inventory?
- 170.137 Are there standards for seasonal transportation routes?
- 170.138 Does construction of a seasonal transportation route require rights-of-way or use permits?

IRR Housing Access Roads and Toll Roads

- 170.140 What is the definition of an IRR housing access road?
- 170.141 What is the definition of an IRR housing street?
- 170.142 Are IRR housing access roads and housing streets eligible for IRR Program funding?
- 170.143 How are IRR housing access roads and housing street projects funded?

- 170.144 Can tribes use Federal-aid highway funds, including IRR funds, for toll and ferry facilities?
- 170.145 How does a tribe initiate construction of a toll highway, bridge or tunnel?
- 170.146 What is the Federal share of a toll highway, bridge or tunnel project?
- 170.147 How does a tribe initiate construction of ferry boats and ferry terminal facilities?
- 170.148 How can tribes find out more information about designing and operating a toll highway, bridge or tunnel?

Recreation, Tourism, Trails

- 170.150 Are Federal funds available for a tribe's recreation, tourism, and trails programs?
- 170.151 How can tribes access non-IRR Federal funds for their recreation, tourism, and trails programs?
- 170.152 Can IRR Program funds be used for recreation, tourism, and trails programs?
- 170.153 What types of activities may tribes perform under a recreation, tourism, and trails program?
- 170.154 Can roads be built in roadless and wild areas?

Highway Safety Functions

- 170.155 What Federal funds are available for a tribe's highway safety activities?
- 170.156 How can tribes obtain funds to perform highway safety projects?
- 170.157 How can IRR funds be used for highway safety and impaired driver initiatives?
- 170.158 What types of activities are eligible as highway safety projects?
- 170.159 Are other funds available for a tribe's highway safety efforts?

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- 170.160 Can IRR Program funds be used for construction of runways, airports, and heliports?
- 170.161 Can IRR Program funds be used for construction of airport and heliport access roads?
- 170.162 Are funds available to construct airports, heliports, and runways?

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- 170.164 What is a tribal transit program?
- 170.165 Are IRR Program funds available for tribal transit programs?
- 170.166 How do tribes identify transit needs?
- 170.167 What Federal funds are available for a tribe's transit program?
- 170.168 May tribes or tribal organizations use IRR funds as matching funds for other transit grants or programs?
- 170.169 What transit facilities and related activities that support tribal transit programs are eligible for IRR funding?
- 170.170 May BIA use IRR funds as matching funds for other transit grants or programs?

IRR Program Coordinating Committee

- 170.171 What is the IRR Program Coordinating Committee?

- 170.172 Who are members of the IRR Program Coordinating Committee?
- 170.173 What are the responsibilities of the IRR Program Coordinating Committee?
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- 170.178 What is the Indian Local Technical Assistance Program?
- 170.179 How does the Indian LTAP work?
- 170.180 How is the Indian LTAP funded?
- 170.181 How do tribes receive information about opportunities under the Indian LTAP?
- 170.182 How are Indian LTAP grant, cooperative agreement, and contracting recipients selected?
- 170.183 Can tribes or tribal organizations enter into a contract or agreement for Indian LTAP funds under the ISDEAA?
- 170.184 What services do Indian LTAP centers provide?
- 170.185 How does a tribe obtain services from an Indian LTAP center?
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- 170.187 What can tribes do if LTAP services are unsatisfactory?
- 170.188 How are Indian LTAP centers managed?
- 170.189 What does the Indian LTAP center advisory committee do?
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- 170.192 Who reviews the performance of Indian LTAP centers?

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- 170.193 What LTAP-sponsored transportation training and educational opportunities exist?
- 170.194 Where can tribes get scholarships and tuition for LTAP-sponsored education and training?

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- 170.235 How does BIA allocate IRR construction program funds to the tribes?
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- 170.248 How will BIA and FHWA rank and fund IRRHPP project applications?
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- 170.250 May an IRRHPP project be phased over several years?
- 170.251 How do tribes apply for IRRHPP?
- 170.252 What must an application for an IRRHPP include?
- 170.253 Are there any transportation activities for which IRRHPP funds cannot be used?
- 170.254 Who ranks the IRRHPP projects?
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- 170.264 What is the distribution factor?
- 170.265 What funding levels are available for distribution based on the PAF?
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- 170.274 How may BIA and FHWA revise the method for calculating the Cost-to-Construct component of the Relative Need Distribution Factor?
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- 170.276 Do all IRR facilities identified in the IRR Inventory count in the Relative Need Distribution Factor at 100% of their CTC and VMT?
- 170.278 What is the VMT component of the Relative Need Distribution Factor and how is it calculated?

- 170.279 What IRR route segments are used to calculate VMT?
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- 170.291 How is the IRR inventory developed?
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- 170.352 Can the Secretary of Transportation execute a federal credit instrument to finance IRR projects?
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- 170.403 Who performs transportation planning for the IRR Program?
- 170.404 What IRR funds can be used for transportation planning?
- 170.405 How must tribes use planning funds?
- 170.406 Can IRR construction funds be used for transportation planning activities?
- 170.407 Can IRR 2 percent planning funds be used for road construction and other projects?
- 170.408 What happens to 2 percent planning funds unobligated after August 15?
- 170.409 What is pre-project planning?
- 170.410 How is the IRR Program transportation planning funded?
- 170.411 What is the State Transportation Improvement Program (STIP)?
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- 170.414 Must the eligible projects on the tribal TIP be included in the IRR TIP?
- 170.415 What happens to the tribal TIP after eligible projects are included in the IRR TIP?
- 170.416 What are the responsibilities of the BIA prior to the IRR TIP being included in the STIP?
- 170.417 How are projects placed on the TTIP and IRR TIP?
- 170.418 What is the tribal priority list?
- 170.419 What is the IRR TIP annual update?
- 170.420 How is the IRR TIP updated?
- 170.421 Should the IRR TIP be coordinated within the STIP time frames?
- 170.422 When may the Secretary amend the IRR TIP?
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- 170.427 What is a long-range transportation plan?
- 170.428 What may a long-range transportation plan include?
- 170.429 What is the purpose of long-range transportation planning?
- 170.430 How does BIA or a tribe involve the public in developing the IRR long-range transportation plan?
- 170.431 How is the IRR long-range plan developed and approved?
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- 170.433 When does BIA update the IRR TIP?
- 170.434 When may the Secretary amend the IRR TIP?
- 170.435 How does BIA or a tribe solicit public participation during the development of the IRR TIP?
- 170.436 What happens after the IRR TIP is approved?

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- 170.437 What are the purposes and objectives of public hearings for the IRR TIP, long-range transportation plan, and IRR projects?
- 170.438 When is a public hearing for IRR TIP, long-range transportation plan or project held?
- 170.439 How are public hearings for IRR planning and projects funded?
- 170.440 How does BIA or the tribe determine the need for a public hearing?
- 170.441 How is the public informed when no public hearing is scheduled?
- 170.442 How must BIA or a tribe inform the public when a hearing is held?
- 170.443 How is a public hearing conducted?
- 170.444 How are the results of a public hearing obtained?
- 170.445 Can a decision be appealed?

IRR Inventory

- 170.446 What is the IRR inventory?
- 170.447 How is the IRR inventory used?
- 170.448 How is the IRR inventory database amended?
- 170.449 How are transportation facilities added to or deleted from the IRR inventory?
- 170.450 What facilities can be included in the IRR inventory?
- 170.451 How accurate must the IRR road inventory database be?
- 170.452 What are the standards for IRR atlas maps?
- 170.453 What is a strip map?
- 170.454 How are strip maps used?
- 170.455 What standards must IRR inventory strip maps meet?
- 170.456 What is functional classification?
- 170.457 What are the functional classifications of the IRR Program?
- 170.458 How are functional classifications used in the IRR Program?
- 170.459 How is the surface type determined for an IRR road project?
- 170.460 What is a proposed IRR transportation facility?

Environment and Archeology

- 170.461 What are the archeological and environmental requirements for the IRR Program?
- 170.462 Can IRR funds be used for required archeological and environmental compliance work?

Design

- 170.464 What design standards are used in the IRR Program?
- 170.465 May BIA use FHWA-approved State or tribal design standards?
- 170.466 How are these standards used in the design of IRR projects?
- 170.467 When can a tribe request an exception from the design standards?
- 170.468 If BIA or FHWA denies a design exception, can that decision be appealed?
- 170.469 How long does BIA or FHWA have to approve or decline a design exception request by a tribe?

Construction and Construction Monitoring and Rights-of-Way

- 170.472 What road and bridge construction standards are used in the IRR Program?
- 170.473 What standards must be used for intermodal projects?
- 170.474 May BIA use FHWA-approved State or tribal road and bridge construction standards?
- 170.475 How will BIA monitor the IRR project during construction?
- 170.476 Is tribal consultation required in order to change a construction project?
- 170.477 Who conducts inspections of IRR construction projects under a self-determination contract or self-governance agreement?
- 170.478 What is quality control and who performs it?
- 170.479 What IRR construction records must tribes and BIA keep?
- 170.480 Can a tribe review and approve plans, specification and estimate (PS&E) packages for IRR projects?
- 170.481 Who must approve all PS&E packages?
- 170.482 How can the plans, specifications, and estimates of an IRR project be changed during construction?
- 170.483 What is the final inspection procedure for an IRR construction project?
- 170.484 How is construction project closeout conducted?
- 170.485 Who has final acceptance of the IRR project audit?
- 170.486 When does a project closeout occur?
- 170.487 Who must conduct the project closeout and develop the report?
- 170.488 What information must be made available for the project closeout?
- 170.489 Who is provided a copy of the IRR construction project closeout report?
- 170.490 Will projects negotiated under Public Law 93-638 specify who will be provided a copy of the closeout report?
- 170.491 Who prepares the IRR construction project closeout report?
- 170.500 What provisions apply to acquiring IRR Program rights-of-way over trust or restricted lands?

- 170.501 What must a right-of-way easement document contain at a minimum?
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Program Reviews and Management Systems

- 170.510 What are BIA IRR Program reviews?
- 170.511 What is an IRR process review of a BIA regional office?
- 170.512 What happens with the information gathered from the IRR process review?
- 170.513 What happens when the review process identifies areas for improvement?
- 170.514 Are management systems required for the IRR Program?
- 170.515 How are IRR Program management systems funded?
- 170.516 How will the IRR management systems be implemented?

Appendix A to Subpart D—Archeological and Environmental Requirements for the IRR Program

Appendix B to Subpart D—Design Standards for the IRR Program

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- 170.600 What IRR Program functions may be assumed by a tribe in a self-determination contract or self-governance agreement?
- 170.601 What IRR project and program functions are not otherwise contractible?
- 170.602 How are the IRR non-contractible program and project functions funded?
- 170.603 May tribes include the cost for contractible supportive administrative functions in their budgets?
- 170.604 How does BIA determine the amount of funds needed for non-contractible non-project related functions?
- 170.605 Are the unused IRR Program management funds reserved by the Secretary considered residual funds?
- 170.606 What happens to the unused portion of IRR Program management funds reserved by the Secretary?
- 170.608 May IRR Programs be contracted under the ISDEAA?
- 170.609 What are consortium contracts/agreements?
- 170.610 What must BIA include in the notice of availability of funds?
- 170.611 Can the Secretary transfer funds to tribal governments before issuing a notice of funding availability?
- 170.612 Can a tribe enter into a self-determination contract or self-governance agreement that exceeds one year?
- 170.613 May a tribe receive advance payments of IRR funds for non-construction activities?
- 170.614 May the Secretary advance payments of IRR funds to a tribe under a self-determination contract for construction activities?
- 170.615 What is a design/construct IRR self-determination contract?

- 170.616 May the Secretary advance payments of IRR funds to a tribe under a self-determination design/construct contract for construction activities?
- 170.617 May the Secretary advance payments of IRR funds to a tribe or consortia under a self-governance agreement?
- 170.618 How are advance payments made when additional IRR funds are made available after execution of the self-governance agreement?
- 170.619 May a self-determination or self-governance tribe include a contingency in its proposal budget?
- 170.620 Can Indian tribes and tribal organizations performing under self-determination contracts of self-governance agreements keep savings that result from their administration of IRR projects or an entire tribal IRR Program?
- 170.621 How do the ISDEAA's Indian preference provisions apply?
- 170.622 Do tribal preference and Indian preference apply to IRR funding?
- 170.623 What protections does the government have if a tribe fails to perform?
- 170.624 What activities may the Secretary review and monitor?
- 170.625 If a tribe incurs unforeseen construction costs, can it get additional funds?
- 170.626 When may BIA use force account methods in the IRR Program?
- 170.627 What regulations apply to BIA force account project activities?
- 170.628 How do legislation and procurement requirements affect the IRR program?
- 170.630 What regulations apply to waivers?
- 170.631 How does a tribe request a waiver of a Department of Transportation regulation?
- 170.632 Is technical assistance available for self-determination contracts and self-governance agreements under the ISDEAA?
- 170.633 What IRR programs, functions, services, and activities are subject to the construction regulations set forth in subpart K of 25 CFR part 1000?
- 170.634 How are IRR program projects and activities included in the self-governance agreement?
- 170.635 Are contract support funds provided in addition to the 2 percent (2%) IRR transportation planning funds?
- 170.636 May contract support costs for IRR construction projects be paid out of Department of the Interior or BIA appropriations?

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- 170.700 What is the IRR Program stewardship plan?
- 170.701 What is an IRR Program stewardship agreement?
- 170.702 What is a BIA regional IRR Program stewardship agreement?
- 170.703 Can a self-determination contract or self-governance agreement serve as an IRR program stewardship agreement?

- 170.704 What must be included in a BIA regional or tribal IRR Program stewardship agreement?
- 170.705 What is the process for obtaining the facility owner's review of the PS&E?
- 170.706 Can a direct service tribe and BIA region sign a Memorandum of Understanding?
- 170.707 Are there licensing requirements to ensure standards are met under the IRR Program?
- 170.708 Must an IRR PS&E be approved before proceeding to construction?

Subpart G—BIA Road Maintenance

- 170.800 What Is IRR Transportation Facility Maintenance?
- 170.801 Who owns IRR Transportation Facilities?
- 170.802 How is BIA Road Maintenance Program related to the IRR Program?
- 170.803 How is road maintenance funded?
- 170.804 What is the BIA Road Maintenance Program?
- 170.805 What facilities are eligible for maintenance and operation under the BIA Road Maintenance Program?
- 170.806 Is maintenance required on facilities built with federal funds?
- 170.807 Do BIA or the tribes have to perform all of the IRR facility maintenance?
- 170.808 What activities are eligible for funding under the BIA Road Maintenance Program?
- 170.809 What is an IRR TFMMS?
- 170.810 What must an effective IRR TFMMS include at a minimum?
- 170.811 Can Maintenance Program funds be used to upgrade IRR facilities?
- 170.812 Can tribes enter into a self-determination contract or self-governance agreement for the BIA Road Maintenance Program?
- 170.813 To what standards must an IRR transportation facility be maintained?
- 170.814 Can BIA Road Maintenance funds be used for heliport facilities?
- 170.815 What happens if a facility is not being maintained due to lack of funds?
- 170.816 Must IRR bridge inspections be coordinated with tribal and local authorities?
- 170.817 What are the minimum qualifications for certified bridge inspectors?
- 170.818 Must bridge inspection reports be reviewed?
- 170.819 How often are IRR bridge inspections performed?
- 170.820 What standards are used for bridge inspections?
- 170.821 What is emergency maintenance?
- 170.822 What is a Declared State of Emergency?
- 170.823 When can access to IRR transportation facilities be restricted?

Appendix A to Subpart G—List of Activities Eligible for Funding Under The BIA Transportation Facility Maintenance Program

Subpart H—Miscellaneous

Hazardous and Nuclear Waste Transportation

- 170.900 What is the purpose of the provisions relating to transportation of hazardous and nuclear waste.
- 170.901 What standards govern transportation of radioactive and hazardous materials?
- 170.902 What transport activities do State, tribal, and local governments perform?
- 170.903 How is a tribe notified of the transport of radioactive waste?
- 170.904 Who responds to an accident involving a radioactive or hazardous materials shipment?
- 170.905 Can tribes use IRR Program funds for training in handling radioactive and hazardous material?
- 170.906 Can tribes obtain training in transporting hazardous material?
- 170.907 How are radioactive and hazardous material spills addressed?

Reporting Requirements and Indian Preference

- 170.910 What information on the IRR Program or projects must BIA provide to tribes?
- 170.915 Are Indians entitled to employment and training preferences?
- 170.916 Are Indian organizations and Indian-owned businesses entitled to a contracting preference?
- 170.918 Is Indian preference permitted for federally funded non-IRR transportation projects?
- 170.919 May tribal-specific employment rights and contract preference laws apply to IRR projects?
- 170.920 What is the difference between tribal preference and Indian preference?
- 170.921 May the cost of tribal employment taxes or fees be included in the budget for an IRR project?
- 170.922 May tribes impose taxes or fees on those performing IRR Program services?
- 170.923 Can tribes receive direct payment of tribal employment taxes or fees?

Emergency Relief

- 170.924 What is the purpose of the provisions relating to emergency relief?
- 170.925 What emergency or disaster assistance programs are available?
- 170.926 How can States get Emergency Relief Program funds to repair IRR System damage?
- 170.927 What qualifies for ERFO funding?
- 170.928 What does not qualify for ERFO funding?
- 170.929 What happens if an ERFO claim is denied?
- 170.930 Is ERFO funding supplemental to IRR Program funding?
- 170.931 Can a tribe administer ERFO repairs under a self-determination contract or a self-governance agreement?

- 170.932 How can FEMA Program funds be accessed to repair damage to the IRR System?

Tribal Transportation Departments

- 170.936 Can a tribe establish a Tribal Transportation Department?
- 170.937 How can tribes find out information about staffing and organization of tribal transportation departments?
- 170.938 Are there any other funding sources available to operate tribal transportation departments?
- 170.939 Can tribes use IRR Program funds to pay for costs to operate a tribal transportation department?
- 170.940 Can tribes regulate oversize or overweight vehicles?

Arbitration Provisions

- 170.941 Are alternative dispute resolution procedures available to self-determination and self-governance tribes and the Secretary to resolve disputes between them in performing IRR Public Law 93–638 activities?
- 170.942 Are alternative dispute resolution procedures available to resolve IRR program disputes?
- 170.943 How does a direct service tribe begin the alternative dispute resolution process?

Other Miscellaneous Provisions

- 170.950 How can a tribe or tribal organization find out if the ISDEAA has superseded an IRR provision?
- 170.951 Can tribes become involved in transportation research?
- 170.952 Are federal funds available for coordinated transportation services for a tribe's Welfare-to-Work, Temporary Assistance to Needy Families, and other quality of life improvement programs?

Authority: Pub. L. 105–178, 112 Stat. 107; 5 U.S.C. 565; 23 U.S.C. 101(a), 208, 308; 25 U.S.C. 47.

Subpart A—General Provisions and Definitions

§ 170.1 What is the authority for this part?

This part is prepared and issued by the Secretary of the Interior with the active participation and agreement of the designated representatives of the Secretary of Transportation and with the active participation and representation of Indian tribes, tribal organizations, and individual tribal members under the Transportation Equity Act for the 21st Century (TEA–21), Section 1115(b), Title 23 Chapter 2, and the negotiated rulemaking procedures in 5 U.S.C. 565.

§ 170.2 What is the purpose and scope of this part?

(a) The purpose of this part is to provide uniform and consistent rules as well as a funding formula for the Department of Interior (DOI) in implementing the Indian Reservation Roads Program.

(b) Included in this part are other Title 23 programs administered by the Secretary and implemented by tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA).

§ 170.3 What is the Federal Government's Indian Reservation Roads policy?

(a) It is the policy of the Secretary of Interior and Secretary of Transportation to:

(1) Provide a uniform and consistent set of rules for the Indian Reservation Roads and BIA Road Maintenance programs;

(2) Encourage Indian tribes and tribal organizations to become more knowledgeable about these programs by providing information on the programs and the opportunities Indian tribes have regarding them;

(3) Facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer these programs and to remove any obstacles to administering these programs;

(4) Encourage including these programs under self-determination contracts or self-governance agreements;

(5) Make available to Indian tribes and tribal organizations all administrative functions of these programs that are otherwise contractible under self-determination contracts or self-governance agreements; and

(6) Implement policies, procedures, and practices at the Departments to ensure the letter, spirit, and goals of TEA–21 are fully and successfully implemented.

(b) This part is designed to facilitate and encourage Indian tribes to participate in the planning, design, construction, maintenance, conduct and administration of these programs. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information and discretion necessary to design these programs under self-determination contracts and self-governance agreements to meet the needs of their communities consistent with these regulations and their diverse needs.

(c) The Secretary of Interior and Secretary of Transportation recognize that contracting, compacting, or continuing to allow federal administration of these programs is an exercise of Indian tribes' self-determination and self-governance.

(1) The tribal contractor is responsible for managing the day-to-day operation of the contracted Federal programs, functions, services, and activities.

(2) The tribe accepts responsibility and accountability to the beneficiaries

under self-determination contracts and self-governance agreements for:

(i) Use of the funds; and
(ii) Satisfactory performance of the program, functions, services, and activities funded under the contract or agreement.

(3) The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(d) The Secretary should interpret Federal laws and regulations in a manner that facilitates including programs covered by this part in the government-to-government agreements authorized under the ISDEAA.

(e) The administrative functions referenced in paragraph (a)(5) of this section are contractible without regard to the organizational level within the Department that carries out these functions.

(1) Including IRR administrative functions under self-determination contracts and self-governance agreements does not limit or reduce in any way the funding for any program, function, service or activity serving any other Indian tribe.

(2) The Secretary is not required to reduce funding for these programs serving a tribe to make funds available to another Indian tribe or tribal organization. This part must be liberally construed for the benefit of Indian tribes and tribal organizations to implement the Federal policy of self-determination and self-governance. Any ambiguities in this part must be construed in favor of the Indian tribes or tribal organization so as to facilitate and enable the transfer of programs, authorized by 23 U.S.C. 202 and Title 25 U.S.C.

§ 170.4 Do other requirements apply to the IRR Program?

Yes, IRR Program policy and guidance manuals and directives must be consistent with the regulations in this part and 25 CFR parts 900 and 1000.

§ 170.5 What is the effect of these regulations on existing tribal rights?

This part does not:

(a) Affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminate, waive, modify, or reduce the trust responsibility of the United States to the Indian tribe(s) or individual Indians;

(c) Require an Indian tribe to assume a program relating to the Indian Reservation Roads program; or

(d) Impede awards by other Departments and agencies of the United

States or a State to Indian tribes to administer programs under any other applicable law.

§ 170.6 What are definitions used in this part?

AASHTO means the American Association of State Highways and Transportation Officials.

Act means the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, as amended.

Annual Funding Agreement means a document that represents the negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to an Indian tribe or tribal organization under the Indian Self-Determination and Education Assistance Act, as amended.

Appeal means a request by a tribe, tribal organization or consortium for an administrative review of an adverse Agency decision.

BIA means the Bureau of Indian Affairs of the Department of the Interior.

BIA DOT means the Bureau of Indian Affairs, Division of Transportation.

BIA force account means the performance of work done by BIA employees.

BIA Road Maintenance Program means the program that covers the distribution and use of the funds provided by Congress in the annual Department of Interior appropriations acts for maintaining transportation facilities.

BIA Regional Director means the BIA official in charge of a Regional Office.

CFR means the United States Code of Federal Regulations.

Compact means an executed document which affirms the government-to-government relationship between a self-governance tribe and the United States. The compact differs from an annual funding agreement in that parts of the compact apply to all bureaus of the Department of the Interior rather than to a single bureau.

Construction means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a highway. This includes bond costs and other costs relating to the issuance in accordance with section 122 of bonds or other debt financing instruments and costs incurred by the State in performing Federal-aid project related audits that directly benefits the Federal-aid highway program. The term includes—

(1) Locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markets in accordance with

specifications of the National Oceanic and Atmospheric Administration of the Department of Commerce);

(2) Resurfacing, restoration, and rehabilitation;

(3) Acquiring rights-of-way;

(4) Providing relocation assistance, acquisition of replacement housing sites, and acquisition and rehabilitation, relocation and construction of replacement housing;

(5) Eliminating hazards of railway grade crossings;

(6) Eliminating roadside obstacles;

(7) Making improvements that directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas; and

(8) Making capital improvements that directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses.

Construction contract means a fixed price or cost-reimbursement self-determination or construction project, except that such term does not include any contract—

(1) That is limited to providing planning services and construction management services (or a combination of such services);

(2) For the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) For the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

Construction management services (CMS) means activities limited to administrative support services, coordination, and monitoring oversight of the planning, design, and construction process. Typical CMS activities are defined in 25 CFR 900.113.

Construction programs means, when used in a self-determination contract, those programs as defined under 25 CFR 900.113(c); and, when used in a self-governance agreement, those programs as defined under 25 CFR part 240.

Construction project management means direct responsibility for the construction project through day-to-day on-site management and administration of the project. Activities may include cost management, project budgeting, project scheduling, and procurement services.

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

(1) Secure meaningful tribal input and involvement in the decision-making process; and

(2) Advise the tribe of the final decision and provide an explanation.

Contract means a self-determination contract as defined in section 4(j) of the Act.

Days means calendar days, except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Departments means the Department of the Interior and the Department of Transportation.

Design means services performed by licensed design professionals related to preparing drawings, specifications, and other design submissions specified in the contract or agreement, as well as services provided by or for licensed design professionals during the bidding/negotiating, construction, and operational phases of the project.

DOI means the Department of the Interior.

FHWA means the Federal Highway Administration in the Department of Transportation.

Funding year means either fiscal year or calendar year, as may be appropriate.

Indian means a person who is a member of an Indian tribe or as otherwise defined in 25 U.S.C. 250b.

Indian tribe means any Indian tribe, nation, band, pueblo, rancheria, colony, or community, including any Alaska Native Village or regional or village corporation as defined or established under the Alaska Native Claims Settlement Act which is federally recognized by the U.S. government for special programs and services provided by the Secretary to Indians because of their status as Indians.

IRR means Indian Reservation Roads.

IRR bridge program means the program authorized under 23 U.S.C. 202(d)(4) using IRR Program funds for the improvement of deficient IRR bridges.

IRR inventory means a comprehensive list of information for all transportation facilities eligible for IRR funding by a tribe or reservation, in order by BIA agency and region, Congressional district, State, and county. Other specific information collected and maintained under the IRR Program includes classification, route number, bridge number, current and future traffic volumes, maintenance responsibility, ownership, and other information as required in subpart C.

IRR Program means a part of the Federal Lands Highway Program

established in 23 U.S.C. 204 to address transportation needs of Indian tribes.

IRR Program Funds means the funds covered in chapter 2 of Title 23 for the cost of transportation planning, research, engineering, and construction of highways, roads, parkways, or transit facilities within or providing access to Indian lands, communities and Alaska Native villages and includes associated program management costs.

IRR transportation facilities means public roads, bridges, drainage structures, including culverts, ferry routes, marine terminals, transit facilities, boardwalks, pedestrian paths, trails, and their appurtenances, and other transportation facilities such as bus terminals, airports, heliports, road maintenance yards, adjacent parking areas, and public parking. It may also include other transportation facilities as designated by the tribe and the Secretary.

IRR transportation planning funds means the funds made available (up to 2%) for Indian reservation roads for each fiscal year under 23 U.S.C. 204(j) as may be allocated to such tribes for purposes of planning Indian reservation roads funding proposals.

ISDEAA means the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, as amended.

Maintenance means the performance of activities to keep an IRR transportation facility at its as constructed condition and to insure the health, safety, and economical use of the traveling public. Maintenance includes the preservation of IRR transportation facilities including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for safe and efficient utilization of the facility.

NBI means the national inventory of structural and appraisal data collected to fulfill the requirements of the National Bridge Inspection Standards, as defined in 23 CFR 650, subpart C. Each State is required to prepare and maintain an inventory of all bridges within that State that are subject to these NBI standards and to provide the collected data to the Federal Highway Administration as needed. The NBI is maintained and monitored by the FHWA Bridge Division in Washington, DC.

Office of Self-Governance (OSG) means the office within the Office of the Assistant Secretary-Indian Affairs, Department of the Interior, which is responsible for the implementation and development of tribal self-governance programs.

Program means a policy, plan, project, program or activity covered by this part.

Project Planning means those project related activities which precede the design phase of a transportation project. These activities include, but are not limited to, collection of detailed traffic data, accident information, functional, safety or structural deficiencies; corridor studies; conceptual studies, environmental studies; geotechnical studies; archaeological studies; project scoping; public hearings; location analysis; preparation of application for permits and clearances, and meetings with facility owners and transportation officials.

Public road means any road or street under the jurisdiction of and maintained by a public authority and open to public travel. An Indian Reservation Road is a public road. Indian tribal governments and BIA are public authorities.

Real Property means any interest in land together with the improvements, structures, and fixtures and appurtenances.

Regionally significant project means a project that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminations as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including, at a minimum, all principal arterial highways and all fixed guideway transit facilities that offer a significant alternative to regional highway travel.

Rehabilitation means the major work required to restore the structural integrity of a bridge as well as work necessary to correct major safety defects.

Relocation means the adjustment of utility facilities required by the highway project. It includes removing and reinstalling the facility, including necessary temporary facilities, acquiring necessary right-of-way on the new location, moving, rearranging or changing the type of existing facilities and taking any necessary safety and protective measures. It also means constructing a replacement facility that is both functionally equivalent to the existing facility and necessary for continuous operation of the utility service, the project economy, or sequence of highway construction.

Rest area means an area or site established and maintained within or adjacent to the highway right-of-way or under public supervision or control for the convenience of the traveling public.

Secretaries means the Secretary of the Interior and the Secretary of Transportation.

Secretary means the Secretary of the Interior or her/his designee authorized to act on behalf of the Secretary.

State transportation agency means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction. The term "State" would be considered equivalent to "State transportation agency" if the context so implies.

TEA-21 means the Transportation Equity Act for the 21st Century, Public Law 105-178, as amended by Title IX of Public Law 105-206.

Transportation Improvement Program (TIP) means a staged, multi-year intermodal program of transportation projects which is consistent with the metropolitan transportation plan.

Transportation planning means developing land use, economic development, traffic demand, public safety, health and social strategies to meet transportation current and future needs.

U.S.C. means the United States Code.

Subpart B—Indian Reservation Roads Program Policy and Eligibility

Consultation, Collaboration, Coordination

§ 170.100 What does "consultation, collaboration, and coordination" mean?

For purposes of this part:

(a) Consultation means government-to-government communication in a timely manner by all parties about a proposed or contemplated decision in order to secure meaningful tribal input and involvement in the decision-making process, and to advise the tribe of the final decision and provide an explanation;

(b) Collaboration means that all parties involved in carrying out the planning and/or project development processes actively work together in a timely manner to achieve a common goal or objective; and

(c) Coordination means sharing and comparing by all parties in a timely manner of transportation plans, programs, projects, and schedules of one agency to related plans, programs, projects, and schedules of other agencies and adjustment of plans, programs, projects, and schedules to optimize the efficient and consistent delivery of transportation projects and services.

§ 170.101 What is the IRR Program consultation and coordination policy?

The IRR Program government-to-government consultation and coordination policy is to foster and improve communication, cooperation and coordination among tribal, Federal, state, and local governments and other transportation organizations when:

(a) Identifying high accident locations and locations for improving both vehicle and pedestrian safety;

(b) Developing state, metropolitan, regional, IRR, and tribal transportation improvement programs that impact tribal lands, communities, and members;

(c) Developing short- and long-range transportation plans;

(d) Developing IRR transportation projects;

(e) Developing environmental mitigation measures necessary to protect and/or enhance Indian lands and the environment, and counteract the impacts of the projects;

(f) Developing plans or projects to replace or rehabilitate IRR deficient bridges;

(g) Developing plans or projects for disaster and emergency relief response and the repair of eligible damaged IRR facilities;

(h) Assisting in the development of state and tribal agreements related to the IRR Program;

(i) Developing and improving transit systems serving Indian lands and communities; and

(j) Assisting in the submission of discretionary grant applications for state and Federal funding for IRR facilities.

§ 170.102 How do the Departments consult, collaborate, and coordinate with tribal governments?

The Department of the Interior and the Department of Transportation operate within a government-to-government relationship with federally recognized tribes. As a critical element of this relationship, these agencies should assess the impact of Federal transportation policies, plans, projects, programs on tribal rights and interests to ensure that these rights and concerns are appropriately considered during the development of all programs.

§ 170.103 What goals and principles guide the Secretaries?

When undertaking transportation activities affecting tribes, the Secretaries should, to the maximum extent permitted by law:

(a) Establish regular and meaningful consultation and collaboration with affected tribal governments, including facilitating the direct involvement of

tribal governments in short- and long-range Federal transportation planning efforts;

(b) Promote the rights of tribal governments to govern their own internal affairs in tribal transportation matters;

(c) Promote the rights of tribal governments to continue receiving direct transportation services from the Federal Government, or to enter into self-determination and self-governance agreements to directly operate any tribally-related transportation programs serving tribal members;

(d) Ensure the continuation of the trust responsibility of the United States to tribes and Indian individuals;

(e) Take appropriate steps to reduce the imposition of unfunded mandates upon tribal governments to the extent permitted by law;

(f) Encourage flexibility and innovation in the implementation of the IRR Program;

(g) Reduce, streamline, and eliminate unnecessarily restrictive transportation policies, guidelines or procedures; and

(h) Ensure that the IRR Program is implemented consistent with tribal sovereignty and the government-to-government relationship.

§ 170.104 Does the Secretary of the Interior consult with tribal governments during the formulation of the annual BIA budget process?

It is the policy of the Secretary to consult with, and solicit the participation of, tribes and tribal organizations in the development of budget proposals for the IRR Program.

§ 170.105 Must the Secretary consult with tribal governments before spending IRR funds?

Yes, before spending IRR funds for any project, the Secretary must consult with any affected tribe or tribal organization to determine tribal preferences to the greatest extent feasible concerning all aspects of the project.

(a) Within 30 days after the Secretary's allocation of funds for any phase of an IRR project, the Secretary must notify affected tribes or tribal organizations by registered mail with return receipt.

(b) The Secretary's notice must offer technical assistance in preparing a self-determination contract or self-governance agreement proposal.

§ 170.106 What funds are available for consultation, collaboration, and coordination activities?

To fund consultation, collaboration, and coordination of IRR activities, tribes or tribal organizations may use:

- (a) IRR funds;
- (b) Tribal Priority Allocation (TPA) funds;
- (c) Administration for Native Americans (ANA) funds;
- (d) Economic Development Administration (EDA) funds;
- (e) Community Development Administration (CDA) funds;
- (f) Community Development Block Grant (CDBG) funds; Indian Housing Block Grant (IHBG) funds;
- (g) Indian Health Service Tribal Management Grant (IHSTMG) funds;
- (h) General funds of the tribal government, Federal Highway Administration (FHWA) transportation planning grants; and
- (i) Any other funds available for the purpose of consultation, collaboration, and coordination activities.

§ 170.107 When must State governments consult with tribes and tribal organizations?

Each State must develop the State transportation improvement program in consultation with tribal organizations and BIA in those areas under Indian tribal jurisdiction. This includes providing for a fully coordinated transportation planning process which, among other things, coordinates transportation planning efforts carried out by the State with transportation planning efforts carried out by tribes and tribal organizations. The statewide and metropolitan planning organization requirements are in 23 U.S.C. 134 and 135. Regulations can be found at 23 CFR part 450.

§ 170.108 Should planning organizations and local governments consult with tribal governments when conducting planning for transportation projects?

Yes, it is the policy of the Department to foster and improve communication, cooperation, and coordination among Metropolitan Planning Organizations (MPOs), Rural Planning Organizations (RPOs), local governments, and municipal governments on transportation matters of common concern. Accordingly, planning organizations and local governments will consult with tribal governments when planning for transportation projects.

§ 170.109 How do the Secretaries prevent discrimination or adverse impact?

In administering the IRR Program, the Secretaries actively monitor these programs to ensure that nondiscrimination and environmental justice principles are integral parts of their programs, policies, and activities. The Secretaries consult with tribes early in the development of these programs, policies, or activities, to identify

potential discrimination and to recommend positive corrective actions to avoid disproportionately high and adverse effects on tribes and Native American populations.

§ 170.110 How can State and local governments prevent discrimination or adverse impact?

(a) Under 23 U.S.C. 134 and 135, and 23 CFR part 450, State and local government officials should consult and work with tribes early in the development of programs to:

- (1) Identify potential discrimination; and
 - (2) Recommend positive corrective actions to avoid disproportionately high and adverse effects on tribes and Native American populations.
- (b) Examples of adverse effects include, but are not limited to:
- (1) Impeding access to tribal communities or activities;
 - (2) Creating excessive access to culturally or religiously sensitive areas;
 - (3) Negatively impacting natural resources, trust resources, tribal businesses, religious, and cultural sites;
 - (4) Harming indigenous plants and animals; and
 - (5) Impairing the ability of tribal members to engage in commercial, cultural, and religious activities.

§ 170.111 What can a tribe do if discrimination or adverse impacts occur?

If discrimination or adverse impacts occur, a tribe should take the following steps in the order listed:

- (a) Take reasonable steps to resolve the problem directly with the State or local government involved;
- (b) Contact BIA, FHWA or Federal Transit Authority (FTA) officials to report the problem and seek assistance in resolving the problem through negotiation or other informal means; and
- (c) If efforts under paragraphs (a) and (b) of this section are unsuccessful, request that BIA, FHWA or FTA invoke legal remedies to correct the problem.

§ 170.112 How can tribes and state and government agencies enhance consultation, collaboration, and coordination?

Tribes and state and Federal Government agencies may enter into intergovernmental Memoranda of Agreement (MOA) to streamline and facilitate consultation, collaboration, and coordination.

Eligibility for IRR Funding

§ 170.114 What activities may be funded with IRR funds?

Notwithstanding any prior guidance, IRR funds may be used:

- (a) For all of the items listed in Appendix A to this subpart;
- (b) For other purposes identified in this part; or

(c) For other purposes identified in guidance issued by the IRR Program Coordinating Committee under the procedures in Appendix A to this subpart, item (35) and § 170.173.

(d) Each of the items listed in the appendix must be interpreted in a manner that permits, rather than prohibits, a proposed use of funds.

§ 170.115 What activities are not eligible for IRR Program funding?

IRR Program funds cannot be used for any of the following:

- (a) Cyclical maintenance work, including patching or marking pavement; grading shoulders and ditches; cleaning culverts; snow removal, roadside mowing, normal sign repair and replacement, painting roadway structures, and maintaining, cleaning, and repairing bridge joints, drainage, and other bridge appurtenances;
- (b) Structures and erosion protection unrelated to transportation and roadways;
- (c) General reservation planning not involving transportation;
- (d) Landscaping and irrigation systems not involving transportation programs and projects;
- (e) Work performed on projects that are not included on an FHWA-approved IRR Transportation Improvement Program (TIP), unless otherwise authorized by the Secretary of the Interior and the Secretary of Transportation;
- (f) Purchase of equipment unless authorized by Federal law; or
- (g) Trail development and related activities prohibited by 23 U.S.C. 206(g).

§ 170.116 How can a tribe determine whether a new proposed use of IRR funds is allowable?

(a) A tribe that proposes a new use of IRR program funds must submit a written inquiry to BIA and FHWA concerning whether the proposed use is eligible under Titles 23 and 25 of the United States Code and other applicable provisions of Federal law.

(b) For eligibility questions that refer to self-determination and self-governance contracting and road maintenance, BIA must provide a written response to the requesting tribe within 60 days of receipt of the written inquiry. For eligibility questions that refer to IRR Program, FHWA must provide a written response to the requesting tribe within 60 days of receipt of the written inquiry. BIA must

approve the proposed use if it is authorized under title 25 of the United States Code and is related to transportation. FHWA must approve the proposed use if it listed as an eligible item in title 23 of the United States Code. To the extent practicable and before denying the request, BIA or FHWA consults with the IRR Program Coordinating Committee.

(c) If either BIA or FHWA fails to issue the requesting tribe a timely written response to the eligibility inquiry, the proposed use will be deemed to be allowable until a determination has been made and the written response is provided to the tribe.

(d) BIA and FHWA will send copies of all eligibility determinations to the IRR Program Coordinating Committee and BIA regional offices.

(e) Tribes may appeal denials of a proposed use pursuant to 25 CFR part 2.

Use of IRR and Cultural Access Roads

§ 170.120 What restrictions apply to the use of an Indian Reservation Road (IRR)?

IRR's must generally be open and available for public use. However, the public authority having jurisdiction over these roads may:

(a) Restrict road use or close roads temporarily to public use when required for public safety, fire prevention or suppression, fish or game protection, low load capacity bridges, or prevention of damage to unstable roadbeds;

(b) Conduct engineering and traffic analysis under established traffic engineering practices to determine maximum speed limits, maximum vehicular size, and weight limits, and identify needed traffic control devices; and

(c) Erect, maintain, and enforce compliance with the needed regulatory signs and pavement markings.

§ 170.121 What is a cultural access road?

A cultural access road is a public road that provides access to sites for cultural purposes as defined by individual tribal traditions, which may include, for example:

- (a) Sacred and medicinal sites;
- (b) Gathering medicines or materials such as grasses for basket weaving; or
- (c) Other traditional activities, including, but not limited to, subsistence hunting, fishing and gathering.

§ 170.122 Who may designate a road as a cultural access road?

Indian tribal governments and other local public authorities may designate a road as a cultural access road.

§ 170.123 May cultural access roads be included in the IRR Inventory?

Yes, cultural access roads may be included in the IRR Inventory if they meet the definition of an IRR Road.

§ 170.124 What is the significance of designating a road as a cultural access road?

A cultural access road designation is an entirely voluntary and internal decision made by the tribe to help it and other public authorities manage, protect, and preserve access to locations that have cultural significance.

§ 170.125 Can a tribe close a cultural access road?

Yes, a tribe with jurisdiction over a cultural access road can close it. The tribe can do this:

(a) During periods when the tribe or tribal members are involved in cultural activities; and

(b) In order to protect the health and safety of the tribal members or the general public.

§ 170.126 Can a tribe designate a non-tribal road a cultural access road?

Yes, tribes and a public authority having jurisdiction over a road may enter into agreements that recognize the tribal designation of a cultural access road and cooperate to protect cultural resources.

Seasonal Transportation Routes

§ 170.130 What are seasonal transportation routes?

Seasonal transportation routes are non-recreational transportation routes in the IRR inventory which are used for access to Indian communities or villages and may not be open for year-round use. These include snowmobile trails, ice roads, and overland winter roads.

§ 170.135 Can IRR Program funds be used to build seasonal transportation routes?

Yes, IRR Program funds can be used to build seasonal transportation routes.

§ 170.136 Can seasonal transportation routes be included in the IRR system inventory?

Yes, by official tribal authorization, a tribe may request that seasonal transportation routes be included in an IRR system inventory.

§ 170.137 Are there standards for seasonal transportation routes?

Yes, in addition, a tribe can develop and/or adopt standards, which are equal to, or exceed, state, Federal, or national standards.

§ 170.138 Does construction of a seasonal transportation route require rights-of-way or use permits?

Yes, use of IRR funds requires rights-of-way or use permits.

IRR Housing Access Roads and Toll Roads

§ 170.140 What is the definition of an IRR housing access road?

An IRR housing access road is a public road on the IRR system that provides access to a housing cluster or Indian community.

§ 170.141 What is the definition of an IRR housing street?

An IRR housing street is a public road on the IRR system that provides access to adjacent homes within a housing cluster or Indian community.

§ 170.142 Are IRR housing access roads and housing streets eligible for IRR Program funding?

Yes, IRR housing access roads and housing streets are eligible for construction, reconstruction, and rehabilitation funding under the IRR Program.

§ 170.143 How are IRR housing access roads and housing street projects funded?

Tribes, following the transportation planning process as required in subpart D, include housing access roads and housing street projects on the Tribal Transportation Improvement Program (TTIP). IRR funds are available after the projects are on the FHWA-approved IRR TIP.

§ 170.144 Can tribes use Federal-aid highway funds, including IRR funds, for toll and ferry facilities?

Yes, Tribes can use Federal-aid highway funds, including IRR funds, to study, design, construct, and operate toll highways, bridges, tunnels, ferry boats and ferry terminal facilities. Tribes are authorized to study, design, construct, and operate these facilities because tribes are public authorities.

§ 170.145 How does a tribe initiate construction of a toll highway, bridge or tunnel?

To initiate construction of a toll highway, bridge, or tunnel, a tribe must:

- (a) Enter into a toll revenue agreement with the Secretary of Transportation under 23 U.S.C. 129; and
- (b) If IRR funds are used, enter into a self-governance agreement or self-determination contract with the Secretary of the Interior.

§ 170.146 What is the Federal share of a toll highway, bridge or tunnel project?

The Federal share is a maximum of 80 percent for conversion of an existing

toll-free highway, bridge or tunnel to a toll facility or 80 percent for construction of a new toll facility.

§ 170.147 How does a tribe initiate construction of ferry boats and ferry terminal facilities?

To initiate construction of ferry boats and ferry terminal facilities, a tribe must follow the procedures defined in 23 U.S.C. 129(c).

§ 170.148 How can tribes find out more information about designing and operating a toll highway, bridge or tunnel?

Information on designing and operating a toll highway, bridge or tunnel is available from the International Bridge, Tunnel and Turnpike Association. This is a Washington, DC-based organization that maintains an address directory of its membership and serves as an information clearinghouse and research center. It also conducts surveys and studies and publishes a variety of reports, statistics, and analyses. Their web site is located at <http://www.ibtta.org>. Information is also available from FHWA.

Recreation, Tourism, Trails

§ 170.150 Are Federal funds available for a tribe's recreation, tourism, and trails programs?

Yes, Tribes may access funding from the following Federal programs for recreation, tourism, and trails:

- (a) IRR Program (23 U.S.C. 204);
- (b) Surface Transportation Program—Transportation Enhancement (23 U.S.C. 133);
- (c) National Scenic Byway Program (23 U.S.C. 162);
- (d) Recreational Trails Program (23 U.S.C. 206);
- (e) National Highway System (23 U.S.C. 104);
- (f) Public Lands Discretionary Program (23 U.S.C. 204, 205, 214); and
- (g) Other funding from other Federal departments.

§ 170.151 How can tribes access non-IRR federal funds for their recreation, tourism, and trails programs?

In order to use non-IRR federal funds for their recreation, tourism, and trails programs, tribes must have a current TIP in place.

(a) To increase opportunities to receive funding for programs that serve tribes' recreation, tourism, and trails goals, it is advisable that tribes:

- (1) Have programs identified and scoped for development;
- (2) Have viable projects ready for construction, including necessary permits;

(3) Have several projects ready for improvement or construction in any given year.

(b) FHWA provides Federal funds to the states for recreation, tourism, and trails under 23 U.S.C. 104, 133, 162, 204, and 206. States solicit proposals from tribes and local governments in their transportation planning process. Tribes may request:

- (1) To administer these programs under the State's locally administered project program;
- (2) That the funds be transferred to BIA for tribal self-determination contracts or self-governance agreements under the ISDEAA; and
- (3) To contract directly with FHWA.

(c) Congress provides funds under 23 U.S.C. 205 and 214 for activities for Federal agencies such as the Bureau of Land Management, National Park Service, Forest Service, Bureau of Reclamation, and the Department of Defense. In accordance with Federal policy these agencies must work with tribal governments to identify and include tribal priority improvement projects on their TIP.

(1) Tribes can contract with all agencies within the Department of the Interior under the ISDEAA for this work.

(2) For agencies outside the Department of the Interior, funds are transferred to BIA for tribal self-determination contracts or self-governance agreements under the ISDEAA.

(d) In order to use National Scenic Byway funds, the project must be on a road designated as a state or Federal scenic byway.

§ 170.152 Can IRR Program funds be used for recreation, tourism, and trails programs?

Yes, a tribe, tribal organization, tribal consortium or BIA may fund activities for recreation, tourism, and trails programs if they are included in the IRR TIP.

§ 170.153 What types of activities may tribes perform under a recreation, tourism, and trails program?

(a) The following are some examples of activities that tribes may perform under a recreation, tourism, and trails program:

- (1) Transportation planning for tourism and recreation travel;
- (2) Adjacent vehicle parking areas;
- (3) Development of tourist information and interpretative signs;
- (4) Provision for non-motorized trail activities including pedestrians and bicycles;

(5) Provision for motorized trail activities including all terrain vehicles, motorcycles, snowmobiles, etc.;

(6) Construction improvements that enhance and promote safe travel on trails;

(7) Safety and educational activities;

(8) Maintenance and restoration of existing recreational trails;

(9) Development and rehabilitation of trailside and trailhead facilities and trail linkage for recreational trails;

(10) Purchase and lease of recreational trail construction and maintenance equipment;

(11) Safety considerations for trail intersections;

(12) Landscaping and scenic enhancement 23 U.S.C. 319;

(13) Bicycle Transportation and pedestrian walkways 23 U.S.C. 217; and

(14) Trail access roads.

(b) The items listed in paragraph (a) of this section are not the only activities that are eligible for recreation, tourism, and trails funding. The funding criteria may vary with the specific requirements of the non-IRR programs.

(c) Tribes may use IRR funds for any activity that is eligible for Federal funding under any provision of title 23 of the United States Code.

§ 170.154 Can roads be built in roadless and wild areas?

Under 25 CFR part 265 no roads can be built in roadless and wild areas.

Highway Safety Functions

§ 170.155 What Federal funds are available for a tribe's highway safety activities?

The following Federal funds are available for a tribe's highway safety activities:

- (a) IRR funds, highway safety program funds under 23 U.S.C. 402;
- (b) Occupant protection program funds under 23 U.S.C. 405;
- (c) Alcohol traffic safety program funds under 23 U.S.C. 408;
- (d) Alcohol-impaired driving countermeasures; and
- (e) Funding for highway safety activities from the U.S. Department of Health and Human Services (HHS) under 23 U.S.C. 410.

§ 170.156 How can tribes obtain funds to perform highway safety projects?

There are two methods to access National Highway Traffic Safety Administration (NHTSA) and other FHWA safety funds for highway safety projects:

(a) FHWA provides safety funds to BIA under 23 U.S.C. 402. BIA annually solicits proposals from tribes for use of these funds. Proposals are processed under 25 CFR part 181. Tribes may

administer these funds under the ISDEAA.

(b) FHWA provides funds to the states under 23 U.S.C. 402, 405, 408, 410, and 412. States annually solicit proposals from tribes and local governments. Tribes may request that state DOTs agree to allow FHWA safety funds to be transferred to DOI so that they can be administered by the tribe under the ISDEAA. Alternatively, tribes can enter into contracts directly with FHWA.

§ 170.157 How can IRR funds be used for highway safety and impaired driver initiatives?

A tribe, tribal organization, tribal consortium, or BIA may fund projects to improve highway safety. Those projects that are not fully funded by BIA-administered Indian highway safety program must be incorporated into the FHWA-approved IRR TIP if IRR funds are used to complete funding of the project.

§ 170.158 What types of activities are eligible as highway safety projects?

The following are several examples of some of the activities that can be considered as highway safety projects:

- (a) Highway alignment improvement;
- (b) Bridge widening;
- (c) Pedestrian paths/sidewalks and bus shelters;
- (d) Installation and replacement of signs when designated as, or made part of, a highway safety project;
- (e) Construction improvements that enhance and promote safe travel on IRR roads, such as guardrail construction and traffic markings;
- (f) Development of a safety management system;
- (g) Education and outreach highway safety programs, such as use of child safety seats, defensive driving, and Mothers Against Drunk Drivers;
- (h) Development of a highway safety plan designed to reduce traffic accidents and deaths, injuries, and property damage;
- (i) Collecting data on traffic-related deaths, injuries and accidents;
- (j) Impaired driver initiatives;
- (k) Child safety seat programs; and
- (l) Purchasing necessary specific traffic enforcement equipment, such as radar equipment, breathalyser, video cameras.

§ 170.159 Are other funds available for a tribe's highway safety efforts?

Yes, Tribes should seek grant and program funding for highway safety activities from appropriate Federal, state, and local agencies and private grant organizations.

Non-Road Transportation Facilities

§ 170.160 Can IRR Program funds be used for construction of runways, airports, and heliports?

No, IRR Program funds cannot be used to construct or improve runways, airports or heliports which provide service to Indian reservations.

§ 170.161 Can IRR Program funds be used for construction of airport and heliport access roads?

Yes, IRR Program funds can be used for construction of airport and heliport access roads if the access roads are open to the public.

§ 170.162 Are funds available to construct airports, heliports, and runways?

Yes, the Federal Aviation Administration (FAA), DOT, funds projects under the Airport Improvement Program (AIP). (See FAA Advisory Circular No. 150/5370-10A.)

Transit Facilities

§ 170.163 What is transit?

For purposes of this part, transit includes those services, equipment, and functions associated with the public movement of people served within a community or network of communities.

§ 170.164 What is a tribal transit program?

A tribal transit program includes the planning, administration, acquisition of vehicles, and the operation and maintenance of a mass transit system associated with the public movement of people served within a community or network of communities on or near Indian reservations, lands, villages, communities, and pueblos.

§ 170.165 Are IRR Program funds available for tribal transit programs?

Yes, title 23 of the United States Code authorizes the use of IRR Program funds for transit facilities as defined in these regulations.

§ 170.166 How do tribes identify transit needs?

Tribes identify transit needs during the tribal transportation planning process. (See Subpart D.) Transit projects using IRR funds must be included in the FHWA-approved IRR TIP.

§ 170.167 What Federal funds are available for a tribe's transit program?

There are many sources of Federal funds that may help support tribal transit programs. These include, but are not limited to, the programs listed in this section. Note that each program has its own terms and conditions of assistance. For further information on these programs and their use for transit,

contact the FTA Regional Transit Assistance Program (RTAP) National Transit Resource Center, 1-800-527-8279 or <http://www.ctaa.org/ntrc>.

(a) U.S. Department of Agriculture (USDA): community facilities loans, rural development loans, business and industrial loans, rural enterprise grants, commerce, public works and economic development grants, economic adjustment assistance.

(b) U.S. Department of Housing and Urban Development (HUD): community development block grants, supportive housing, tribal housing loan guarantees, resident opportunity and support services.

(c) U.S. Department of Labor: Native American employment and training, welfare-to-work grants.

(d) DOT: welfare-to-work, Indian Reservation Roads, transportation and community and systems preservation, Federal transit capital improvement grants, public transportation for non-urbanized areas, capital assistance for elderly and disabilities transportation, education, and Even Start.

(e) HHS: programs for Native American elders, community service block grants, job opportunities for low-income individuals, Head Start (capital or operating), administration for Native Americans programs, Medicaid, HIV Care Grants, Healthy Start, and the Indian Health Service.

§ 170.168 May tribes or tribal organizations use IRR funds as matching funds for other transit grants or programs?

Yes, a tribe or tribal organization may use IRR funds provided under a self-determination contract or self-governance agreement to meet matching or cost participation requirements for any Federal or non-Federal transit grant or program.

§ 170.169 What transit facilities and related activities that support tribal transit programs are eligible for IRR funding?

Facilities and activities eligible for IRR funding include, but are not limited to:

- (a) Acquiring, constructing, supervising or inspecting new, used or re-furnished equipment, buildings, facilities, buses, vans, water craft, and other vehicles for use in mass transportation;
- (b) Transit-related intelligent transportation systems;
- (c) Rehabilitating, re-manufacturing, and overhauling a transit vehicle;
- (d) Preventive maintenance;
- (e) Leasing transit vehicles, equipment, buildings, and facilities for use in mass transportation;
- (f) Third-party contracts for otherwise eligible transit facilities and activities;

(g) Mass transportation improvements that enhance economic and community development, such as bus shelters in shopping centers, parking lots, pedestrian improvements, and support facilities that incorporate other community services;

(h) Passenger shelters, bus stop signs, and similar passenger amenities;

(i) Introduction of new mass transportation technology;

(j) Provision of fixed route, demand response services, and non-fixed route paratransit transportation services (excluding operating costs) to enhance access for persons with disabilities;

(k) Radio and communication equipment to support tribal transit programs; and

(l) Transit capital project activities authorized by 49 U.S.C. 5302(a)(1).

§ 170.170 May BIA use IRR funds as matching funds for other transit grants or programs?

Yes, BIA may use IRR funds to pay local matching funds for transit facilities and activities funded under 23 U.S.C. 104.

IRR Program Coordinating Committee

§ 170.171 What is the IRR Program Coordinating Committee?

Consistent with the government-to-government relationship the United States has with tribes and with the Federal policy of promoting tribal self-determination, the Secretaries established an IRR Program Coordinating Committee. The Committee provides input and recommendations to BIA and FHWA in developing policies and procedures for the IRR Program. The IRR Program Coordinating Committee supplements government-to-government consultation by coordinating with and obtaining input from tribes, BIA personnel, and FHWA personnel.

§ 170.172 Who are members of the IRR Program Coordinating Committee?

(a) The Committee consists of 12 tribal member representatives (one from each BIA Region) and three non-voting Federal representatives (FHWA, BIA, DOT and DOI-OSG).

(b) The Secretary will select one alternate tribal member from each BIA Region to attend committee meetings in the absence of the regional representative.

(c) The Secretary must select regional tribal representatives and alternates from nominees selected by the region's tribes by tribal resolution or other official action. To the extent possible, the Secretary must make the selection so that there is representation from a broad

cross-section of large, medium, and small tribes. Each tribal representative must be a tribal governmental official or employee with authority to act for the tribal government.

(d) For purposes of continuity, the Secretary will appoint the initial tribal representative and alternate from each BIA region to either a 1-, 2-, or 3-year term so that only one-third of the tribal representatives and alternates change every year. Thereafter, all appointments must be for a term of 3 years.

§ 170.173 What are the responsibilities of the IRR Program Coordinating Committee?

(a) Committee responsibilities are to provide input and recommendations to BIA and FHWA during the development or revision of:

- (1) BIA/FHWA IRR Stewardship Plan;
- (2) IRR Program policy and procedures;
- (3) IRR eligible activities determination;
- (4) IRR transit policy;
- (5) IRR regulations;
- (6) IRR management systems policy and procedures; and
- (7) National tribal transportation needs.

(b) The Committee may establish work groups to carry out their responsibilities; and

(c) The Committee also reviews IRR program national concerns (including the implementation of these regulations) brought to the attention of the Committee and provides recommendations.

§ 170.174 How often will the IRR Program Coordinating Committee meet?

The Committee holds at least two meetings a year. Additional Committee meetings may be called with the consent of one-third of the Committee members or by BIA or FHWA.

§ 170.175 How does the IRR Program Coordinating Committee conduct business at its meetings?

The Committee conducts business at its meetings as follows:

- (a) A quorum consists of eight Committee members of which a majority must be tribal committee members.
- (b) The Committee will operate by consensus or majority vote, as determined by the Committee in its protocols.
- (c) Any Committee member can submit an agenda item to the Chairperson.
- (d) The Committee will work through a committee-approved annual work plan and budget.
- (e) Annually, the Committee must elect from among the Committee membership a Chairperson, a Vice

Chairperson, and other officers. These officers will be responsible for preparing for and conducting Committee meetings and summarizing meeting results. These officers will also have such duties as the Committee may prescribe.

§ 170.176 How will the IRR Program Coordinating Committee be funded?

The budget will be funded through the IRR Program management funds, not to exceed \$150,000 annually.

§ 170.177 How must the Committee keep the Secretary and the tribes informed of the Committee's accomplishments?

The Committee must keep the Secretary and the tribes informed through an annual accomplishment report provided within 90 days after the end of each fiscal year.

Indian Local Technical Assistance Program (LTAP)

§ 170.178 What is the Indian Local Technical Assistance Program?

The Indian LTAP program is authorized under 23 U.S.C. 504(b) and §§ 170.178–192 are provided for information only. The Indian Local Technical Assistance Program (LTAP) assists tribal governments and other IRR Program participants in extending their technical capabilities by providing them greater access to surface transportation technology and transportation training and research opportunities.

§ 170.179 How does the Indian LTAP work?

The Indian LTAP provides funds to Indian technical centers (also known as Tribal Technical Assistance Program Centers (TTAPs)) to provide transportation technology transfer services to tribal governments and IRR Program participants. FHWA can also make grants and enter into cooperative agreements and contracts with tribal governments or a consortium of tribal governments or state transportation departments or universities to provide education, training, technical assistance and related support services to do the following:

- (a) Develop and expand tribal expertise in road and transportation areas;
- (b) Improve IRR road and bridge performance;
- (c) Enhance tribal intergovernmental transportation planning and project selection programs and tribal transit and freight programs;
- (d) Develop transportation training courses, manuals, guidelines, and technical resource materials;
- (e) Improve tribal programs for tourism and recreational travel;

(f) Develop and share tribal transportation technology and traffic safety information with other government transportation agencies so that they can deal more effectively with transportation-related problems affecting tribal governments;

(g) Operate Indian technical centers in cooperation with state transportation departments and universities;

(h) Enhance new technology implementation in cooperation with the private sector; and

(i) Develop educational programs to encourage and motivate interest in transportation careers among Native American students.

§ 170.180 How is the Indian LTAP funded?

FHWA uses Highway Trust Funds to fund the Indian LTAP program. BIA may only use IRR administrative funding for Indian LTAP centers. These funds may be used to operate Indian LTAP centers and to develop training materials and products for these centers. The Indian LTAP centers are encouraged to apply for supplemental funding from other sources to accommodate their needs.

§ 170.181 How do tribes receive information about opportunities under the Indian LTAP?

(a) FHWA announces Indian LTAP grant, cooperative agreement, and contracting opportunities in the **Federal Register**. The announcements state that tribal governments and consortia are eligible for these awards, indicate the amount of funds available and provide any eligibility criteria.

(b) FHWA sends the information in paragraph (a) of this section to BIA for distribution to tribal governments and consortia. BIA must provide written notice to tribal governments and consortia.

(c) FHWA notifies tribal governments and consortia if they receive grant awards.

§ 170.182 How are Indian LTAP grant, cooperative agreement, and contracting recipients selected?

A selection committee of Federal and tribal representatives from the region's Indian LTAP advisory committee (see § 170.189) reviews the proposals of eligible applicants and recommends the award recipient(s). FHWA selects recipients consistent with applicable law.

§ 170.183 Can tribes or tribal organizations enter into a contract or agreement for Indian LTAP funds under the ISDEAA?

Yes, if selected for award, a tribe or tribal organization may request that FHWA allocate the available funds to

BIA and a tribe or tribal organization may enter into a self-determination contract or self-governance agreement for the activities under the ISDEAA.

§ 170.184 What services do Indian LTAP centers provide?

(a) The Indian LTAP centers:

(1) Provide training materials and present workshops to tribal personnel and IRR Program participants;

(2) Act as information clearinghouses for tribal governments and Indian-owned businesses on transportation-related topics; and

(3) Provide technical assistance on transportation technology and other transportation topics as requested by tribal staff and IRR Program participants.

(b) Unless otherwise stated in an Indian LTAP agreement, an Indian technical assistance program center must, at a minimum:

(1) Maintain a current mailing/contact list including, at a minimum, each tribe/tribal consortia and IRR Program participants within the service area;

(2) Publish a quarterly newsletter and maintain a web site;

(3) Conduct and/or coordinate 10 workshops per year;

(4) Maintain a library of technical publications and video tapes;

(5) Provide technical assistance to IRR Program participants;

(6) Hold two advisory committee meetings a year;

(7) Develop a yearly action plan in consultation with the advisory committee;

(8) Coordinate with state LTAPs, other Indian technical centers, and Rural Technical Assistance Program (RTAP) centers, tribal governments or consortia and local planning and transportation agencies to share and exchange publications, video tapes, training material, and conduct joint workshops;

(9) Consult with tribes, tribal consortia, and IRR Program participants concerning technical assistance and training desired; and

(10) Prepare an annual report and distribute this report to service area tribes.

§ 170.185 How does a tribe obtain services from an Indian LTAP center?

A tribe that wants to obtain services should contact the Indian LTAP center serving its service area or its BIA regional road engineer. Information about the centers and the services provided can be found on the Internet at the following address <http://www.irr.bia.gov>.

§ 170.186 Do Indian LTAP centers offer similar services provided by state LTAPs?

Yes, however, Indian LTAP centers are primarily responsible for increasing the capacity of tribal governments to administer transportation programs. State LTAPs also provide services to local and rural governments, including tribal governments. Indian LTAP centers should coordinate education and training opportunities with state LTAP centers to maximize resources.

§ 170.187 What can tribes do if LTAP services are unsatisfactory?

Tribal governments can make their concerns known to the Indian LTAP Center Director, FHWA and/or BIA. If the center does not adequately address these concerns in writing within 30 calendar days, the tribal government may request any or all of the following:

(a) A special meeting with the Center's Director and staff to address the concern;

(b) A review of the Center's performance by FHWA;

(c) Services from other Indian LTAP centers; or

(d) That the center's cooperative agreement not be funded in the subsequent year.

§ 170.188 How are Indian LTAP centers managed?

Each center is managed by its Center Director and staff, with the advice of its advisory committee under the LTAP agreements.

§ 170.189 What does the Indian LTAP center advisory committee do?

(a) The advisory committee consists of one BIA Regional Road Engineer, one FHWA representative, one state DOT representative, and at least five tribal representatives from the service area. The advisory committee may, among other activities:

(1) Recommend center policies;

(2) Review and approve the annual action plan for submission to FHWA for approval;

(3) Provide direction on the areas of technical assistance and training;

(4) Review and approve the annual report for submission to FHWA for approval;

(5) Develop recommendations for improving center operation services and budgets; and

(6) Assist in developing goals and plans for obtaining or using supplemental funding.

(b) The advisory committee must meet at least twice a year. Tribal representatives may request IRR funding to cover the cost of participating in these committee meetings.

§ 170.190 How are tribal advisory committee members selected?

(a) The LTAP center requests nominations from tribal governments and consortia within the service area for tribal transportation representatives to serve on the advisory committee.

(b) Tribes from the service area select tribal committee members from those nominated.

§ 170.191 How are tribal representatives nominated and selected?

In its written notice to tribal governments and consortia announcing opportunities under the Indian LTAP program, FHWA requests nominations within each Indian LTAP's service area for representatives to serve on the service area advisory committee. Forty-five days after the request for nominations, FHWA will notify tribal governments and consortia of the nominees for the service area. Each tribe then has 30 days to notify FHWA of its selection from the nominees.

§ 170.192 Who reviews the performance of Indian LTAP centers?

FHWA, BIA, advisory committees, and tribes review the performance of the Indian LTAP centers.

LTAP-Sponsored Education and Training Opportunities**§ 170.193 What LTAP-sponsored transportation training and educational opportunities exist?**

There are many programs and sources of funding that provide tribal transportation training and education opportunities. Each program has its own terms and conditions of assistance. For further information on these programs and their use for tribal transportation education and training opportunities, contact the Regional Indian LTAP center or the BIA Regional Road Engineer. Appendix B to this subpart contains a list of programs and funding sources.

§ 170.194 Where can tribes get scholarships and tuition for LTAP-sponsored education and training?

Tribes can get tuition and scholarship assistance for LTAP-sponsored education and training from the following sources:

- (a) LTAP centers;
- (b) BIA-appropriated funds (for approved training); and
- (c) IRR funds (for education and training opportunities and technical assistance programs related to developing skills for performing IRR Program activities).

Appendix A to Subpart B**Allowable Uses of IRR Program Funds***A. IRR Program Funds Can Be Used For the Following Planning and Design Activities:*

1. Planning and design of IRR transit facilities eligible for IRR construction funding;
2. Planning and design of IRR roads and bridges.
3. Planning and design of transit facilities that provide access to or are located within an Indian reservation or community.
4. Transportation planning activities, including planning for tourism and recreational travel.
5. Development, establishment, and implementation of tribal transportation management systems such as safety, bridge, pavement, and congestion management.
6. Tribal transportation plans and transportation improvement programs (TIPS).
7. Research for coordinated technology implementation program (CTIP).
8. Traffic engineering and studies.
9. Identification and evaluation of accident prone locations.
10. Tribal transportation standards.
11. Preliminary engineering studies.
12. Interagency program/project formulation, coordination and review.
13. Environmental studies and archeological investigations directly related to transportation programs and projects.
14. Costs associated with obtaining permits and/or complying with tribal, Federal, state, and local environmental, archeological and natural resources regulations and standards.
15. Development of natural habitat and wetland conservation and mitigation plans, including plans authorized under the Water Resources Development Act of 1990, 104 Stat. 4604 (Water Resources Development Act).
16. Architectural and landscape engineering services related to transportation programs.
17. Engineering design related to transportation programs, including permitting activities.
18. Inspection of bridges and structures.
19. Indian local technical assistance program (LTAP) centers.
20. Highway and transit safety planning, programming, studies and activities.
21. Tribal employment rights ordinance (TERO) fees.
22. Purchase or lease of advanced technological devices used for transportation planning and design activities such as global positioning units, portable weigh-in-motion systems, hand held data collection units, related hardware and software, etc.
23. Planning, design and coordination for Innovative Readiness Training projects.
24. Transportation planning and project development activities associated with border crossings on or affecting tribal lands.
25. Public meetings and public involvement activities.
26. Leasing or rental of equipment used in transportation planning or design programs.
27. Transportation-related technology transfer activities and programs.
28. Educational activities related to bicycle safety.

29. Planning and design of mitigation of damage to wildlife, habitat, and ecosystems caused by a transportation project.

30. Evaluation of community impacts such as land use, mobility, access, social, safety, psychological, displacement, economic, and aesthetic impacts.

31. Acquisition of land and interests in land required for right-of-way, including control of access thereto from adjoining lands, the cost of appraisals, cost of examination and abstract of title, the cost of certificate of title, advertising costs, and any fees incidental to such acquisition.

32. Cost associated with relocation activities including financial assistance for displaced businesses or persons and other activities as authorized by law.

33. On the job education including classroom instruction and pre-apprentice training activities related to transportation planning.

34. Other eligible activities as approved by FHWA.

35. Any additional activities identified by IRR Program Coordinating Committee guidance and approved by the appropriate Secretary (see § 170.173).

B. IRR Program Funds Can Be Used for the Following Construction and Improvement Activities

1. Construction, reconstruction, rehabilitation, resurfacing, restoration, and operational improvements for IRR roads and bridges including bridges and structures under 20 feet in length.

2. Construction or re-construction of IRR roads and bridges necessary to accommodate other transportation modes.

3. Construction of toll roads, bridges and tunnels, and toll and non-toll ferry boats and terminal facilities, and approaches thereto (except when on the Interstate System) to the extent permitted under 23 U.S.C. 129.

4. Construction of projects for the elimination of hazards at railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings.

5. Installation of protective devices at railway-highway crossings.

6. Transit facilities, whether publicly or privately owned, that serve Indian reservations and other communities or that provide access to or are located within an Indian reservation or community (See §§ 170.163–170.170 for additional information).

7. Engineered pavement overlays that add to the structural value and design life or increasing the skid resistance of the pavement.

8. Tribally-owned, post-secondary vocational school roads and bridges.

9. Road sealing.

10. Double bituminous surface and chip seals that are part of a predefined stage of construction or form the final surface of low volume roads.

11. Seismic retrofit, replacement, rehabilitation, and painting of bridges.

12. Application of calcium magnesium acetate, sodium acetate/formate, or other

environmentally acceptable, minimally corrosive anti-icing and de-icing compositions on bridges, and approaches thereto and other elevated structures.

13. Installation of scour countermeasures for bridges and other elevated structures.

14. Special pedestrian facilities built in lieu of streets or roads, where standard street or road construction is not feasible.

15. Interpretive signs, standard traffic regulatory and guide signs which are culturally relevant (native language, symbols, etc.) that are a part of transportation projects.

16. Traffic barriers and bridge rails.

17. Engineered spot safety improvements resulting from safety studies.

18. Planning and development of rest areas, recreational trails, parking areas, sanitary facilities, water facilities, and other facilities which accommodate the traveling public.

19. Public approach roads and interchange ramps which meet the definition of an Indian reservation road.

20. Construction of roadway lighting and traffic signals.

21. Adjustment or relocation of utilities directly related to roadway work, not required to be paid for by local utility companies.

22. Conduits crossing under the roadway to accommodate utilities which are part of future development plans.

23. Restoration of borrow and gravel pits created by projects funded from the IRR Program.

24. Force account and day labor work, including materials and equipment rental, being performed in accordance with approved plans and specifications.

25. Experimental features where there is a planned monitoring and evaluation schedule.

26. Capital and operating costs for traffic monitoring, management, and control facilities and programs.

27. Handling traffic and pedestrians through construction zones.

28. Construction engineering including contract/project administration, inspection, and testing.

29. Construction of temporary and permanent erosion control, including landscaping and seeding of cuts and embankments.

30. Landscape and roadside development features.

31. Marine terminals as intermodal linkages.

32. Construction of visitor information centers and related items.

33. Other appropriate public road facilities such as visitor centers as determined by the Secretary of Transportation.

34. Facilities adjacent to roadways to separate pedestrians and bicyclists from vehicular traffic for operational safety purposes, or special trails on separate rights-of-way.

35. Construction of pedestrian walkways and bicycle transportation facilities, such as a new or improved lane, path, or shoulder for use by bicyclists and a traffic control device, shelter, or parking facility for bicycles.

36. Facilities adjacent to roadways to separate modes of traffic for safety purposes.

37. Acquisition of scenic easements and scenic or historic sites provided they are part of an approved project or projects.

38. Debt service on bonds or other debt financing instruments issued to finance IRR construction and project support activities.

39. Any project to encourage the use of carpools and vanpools, including provision of carpooling opportunities to the elderly and individuals with disabilities, systems for locating potential riders and informing them of carpool opportunities, acquiring vehicles for carpool use, designating existing highway lanes as preferential carpool highway lanes, providing related traffic control devices, and designating existing facilities for use for preferential parking for carpools.

40. Fringe and corridor parking facilities including access roads, buildings, structures, equipment improvements, and interests in land.

41. Adjacent vehicular parking areas.

42. Costs associated with obtaining permits and/or complying with tribal, Federal, state, and local environmental, archeological, and natural resources regulations and standards on IRR projects.

43. Seasonal transportation routes, including snowmobile trails, ice roads, overland winter roads, and trail markings when designed and constructed with requirements defined in § 170.130.

44. Tribal fees such as employment taxes (TERO), assessments, licensing fees, permits, and other regulatory fees.

45. On the job education including classroom instruction and pre-apprentice training activities related to IRR construction projects such as equipment operations, surveying, construction monitoring, testing, inspection and project management.

46. Installation of advance technological devices on IRR facilities such as permanent weigh-in-motion systems, informational signs, intelligent transportation system hardware, etc.

47. Tribal, cultural, historical, and natural resource monitoring, management and mitigation.

48. Mitigation activities required by tribal, state, or Federal regulatory agencies and 42 U.S.C. 4321, *et seq.*, the National Environmental Policy Act (NEPA).

49. Leasing or rental of construction equipment.

50. Coordination and construction materials for innovative readiness training projects such as the Department of Defense (DOD), the American Red Cross, the Federal Emergency Management Agency (FEMA), etc.

51. Emergency repairs on IRR roads, bridges, trails, and seasonal transportation routes.

52. Public meetings and public involvement activities.

53. Construction of roads on dams and levees.

54. Transportation enhancement activities as defined in 23 U.S.C. 101(a)(35).

55. Modification of public sidewalks adjacent to or within IRR transportation facilities.

56. Highway and transit safety infrastructure improvements and hazard eliminations.

57. Transportation control measures such as employer-based transportation

management plans, including incentives, shared-ride services, employer-sponsored programs to permit flexible work schedules and other activities listed in section 108(f)(1)(A) (other than clause (xvi) of the Clean Air Act, (42 U.S.C. 7408(f)(1)(A))).

58. Necessary environmental restoration and pollution abatement.

59. Trail development and related activities as identified in §§ 170.150–170.154.

60. Development of scenic overlooks and information centers.

61. Natural habitat and wetlands mitigation efforts related to IRR road and bridge projects, including:

a. Participation in natural habitat and wetland mitigation banks, including banks authorized under the Water Resources Development Act, and

b. Contributions to tribal, statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetland, including efforts authorized under the Water Resources Development Act.

62. Mitigation of damage to wildlife, habitat and ecosystems caused as a result of a transportation project.

63. Construction of permanent fixed or moveable structures for snow or sand control.

64. Cultural access roads.

65. Other eligible items as approved by the Federal Highway Administration (FHWA).

66. Any additional activities identified by IRR Program Coordinating Committee and approved by the appropriate Secretary (see § 170.173).

Appendix B to Subpart B

Sources of Tribal Transportation Training and Education Opportunities

The following is a list of some of the many sources for tribal transportation training and education opportunities. There may be other sources not listed here.

1. National Highway Institute training courses and fellowships
2. State and local technical assistance program workshops
3. Indian technical assistance center workshops
4. FHWA and FTA Research Fellowships
5. Dwight David Eisenhower Transportation Fellowship (23 U.S.C. 504)
6. Intergovernmental personnel agreement assignments
7. BIA transportation cooperative education program
8. American Association State Highway & Transportation Officials (AASHTO)
9. Transportation Research Board (TRB) workshops
10. Private sector course offerings
11. Union apprenticeships
12. BIA force account operations
13. Intertribal Transportation Association (ITA)
14. FTA RTAP
15. State DOTs
16. Federal-aid highway construction and technology training including skill improvement programs under 23 U.S.C. 140 (b)(c)
17. Minority Business Enterprise (MBE), Women's Business Enterprise (WBE), Disadvantaged Business Enterprise (DBE),

Small Business Enterprise (SBE), Women's Disadvantaged Enterprise (WDBE)

18. Other funding sources identified in § 170.167 (Transit)

19. Department of Labor work force development

20. Indian Employment, Training, and Related Services Demonstration Act, Pub. L. 102-477

21. Garrett Morgan Scholarship (FHWA)

22. Tribal colleges

23. NITI—National Indian

Telecommunications Institute

24. AISES—American Indian Science and Engineering Society

25. CTAA—Community Transit

Association of America

26. NTRC—National Transit Resource Center

27. CTER—Council for Tribal Employment Rights

28. American Traffic Safety Association

29. APA—American Planning Association

30. PMI—Project Management Institute

31. BIA Indian Highway Safety Program

32. NRC—National Research Council

33. CERT—Council for Energy Resource Tribes

34. FHWA/STIPDG and NSTISS Student Internship Programs (Summer Transportation Internship Program for Diverse Groups and National Summer Transportation Institute for Secondary Students)

35. Environmental Protection Agency (EPA)

36. Department of Commerce (DOC)

37. HUD Community Planning and Development

Subpart C—Indian Reservation Roads Program Funding

§ 170.225 How are IRR Program funds allocated?

These regulations allocate IRR Program funds according to the Tribal Transportation Allocation Methodology (TTAM) by:

(a) Continuing the 2% Transportation Planning Program;

(b) Creating a discretionary pool for IRR High Priority Projects (IRRHPP);

(c) Creating a special provision for additional authorization greater than \$275,000,000 that includes:

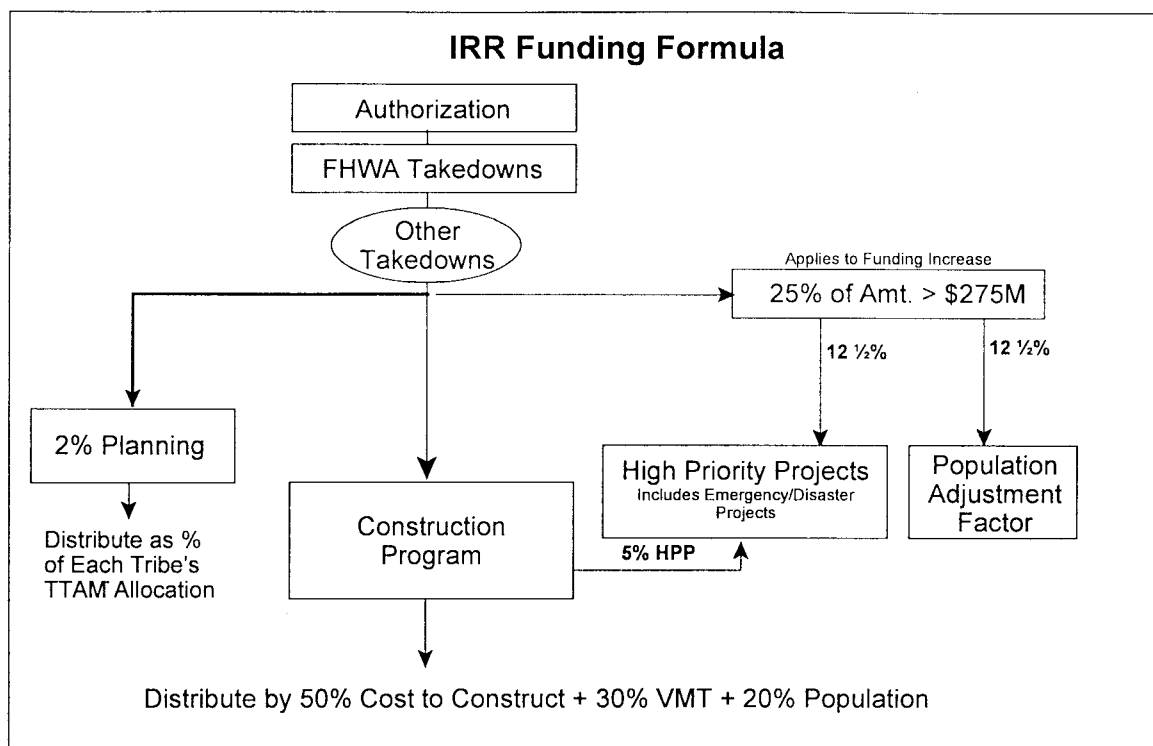
(1) Increased Funding = Authorization—\$275,000,000;

(2) Of Increased Funding, after takedowns, 12.5% added to IRRHPP and 12.5% to Population Adjustment Factor (PAF); and

(3) Distributing the balance of the funds by the following Relative Need Distribution Factor: 50% Cost to Construct + 30% Vehicle Miles Traveled + 20% Population.

§ 170.226 What is the process to allocate IRR Program funds?

The following diagram illustrates the process for allocating IRR Program funds.



§ 170.232 How does BIADOT allocate and distribute 2% Transportation Planning funds?

BIADOT distributes 2% Tribal Transportation Planning funds described in § 170.404 pro rata according to the tribes' relative need percentage from the Relative Need Distribution Factor. The 2% transportation planning funds must be distributed to the Office of Self-Governance for self-governance tribes that negotiate 2% transportation

planning in their AFA's and BIA Regional Offices for all other tribes.

Tribal Transportation Allocation Methodology for IRR Construction

§ 170.235 How does BIA allocate IRR construction program funds to the tribes?

BIA allocates IRR construction program funds by the Tribal Transportation Allocation Methodology as follows:

(a) Creating the IRRHPP funding pool;

(b) For authorizations greater than \$275 million, after takedowns, establishing the PAF; and

(c) Allocating the balance of the funds according to the Relative Need Distribution Factor.

§ 170.236 Does the Relative Need Distribution Factor allocate funding among the individual tribes, or only to the Regions?

The Relative Need Distribution Factor allocates funding to the tribes under 23 U.S.C. § 202(d)(2). The IRR construction

funds are allocated pro rata according to the tribes' relative need percentage from the Funding Formula. The IRR construction funds must be re-programmed to the Office of Self-Governance for Self-Governance tribes that negotiate IRR construction funds in their AFA, and distributed to BIA Regional Offices for all other tribes. However, in order for a tribe's IRR allocation to be expended on a construction project, the project must be included in an FHWA-approved Transportation Improvement Program (TIP).

IRR High Priority Project (IRRHPP) Program

§ 170.245 What is the IRR High Priority Project (IRRHPP) Program?

The IRRHPP Program is a special funding pool for tribes, or governmental subdivision of a tribe that is authorized to administer its own IRR funding, whose annual allocation is insufficient to complete their highest priority project. Eligible applicants may have only one application pending in the IRRHPP at any time. In addition, IRRHPP Program funds can be used in an emergency/disaster on any IRR system route.

§ 170.246 How is an emergency/disaster defined?

An emergency/disaster is defined as damage to an IRR facility identified as vital to the community, such that the facility is rendered impassable or unusable, caused by a natural disaster over a widespread area or catastrophic failure from an external cause.

(a) Examples of a natural disaster include, but are not limited to, floods, earthquakes, tornadoes, landslides, and avalanches or severe storms, such as saturated surface conditions and/or high-water table caused by precipitation over an extended period of time; and

(b) An example of a catastrophic failure includes, but is not limited to, a bridge collapse after being struck by a barge or a truck or a landslide.

§ 170.247 What funding levels are available to the IRRHPP Program?

The base IRRHPP Program funding level is 5% of available IRR Program funds, up to \$275,000,000, after takedowns. If the yearly authorization is greater than \$275,000,000, an additional amount, after takedowns, is available to IRRHPP. This amount is calculated as follows:

Additional IRRHPP = 12.5% × (Authorization – \$275,000,000 (after takedowns)).

§ 170.248 How will BIA and FHWA rank and fund IRRHPP project applications?

(a) BIA and FHWA will fund IRRHPP project applications that are for emergency/disaster projects on a first-come first-serve basis, subject to availability of funds. Emergency/disaster awards are limited to the estimated cost of the emergency (necessary to restore usability of the facility), not to exceed \$1,000,000, with certification of cost estimate by the Regional Engineer.

(b) BIA and FHWA will score, rank, and fund all other IRRHPP project applications based upon the following criteria and availability of funds:

- (1) Safety hazards with documented fatality and injury accidents;
 - (2) Number of years since the tribe's last IRR construction project completed;
 - (3) Number of years that a proposed project has been in the IRRHPP applicant pool;
 - (4) Percentage of project matched by other non IRR funds (projects with a greater percentage of other matched funds rank ahead of lesser matches);
 - (5) Amount of funds requested (smaller requests receive greater priority);
 - (6) Challenges caused by geographic isolation; and
 - (7) All weather access for: employment, commerce, health, safety, educational resources, and housing.
- (c) The Project Scoring Matrix is found in Appendix A to subpart C.

§ 170.249 Is there a limit on the amount of IRRHPP funding available for a project?

Yes, the limit of IRRHPP funding per project is \$1,000,000.

§ 170.250 May an IRRHPP project be phased over several years?

Yes, IRRHPP projects may be phased over more than one year, provided the total amount of IRRHPP funds needed to complete the project does not exceed \$1,000,000. For example, a tribe might receive \$100,000 in year one for pre-construction and \$900,000 in year two for construction. The plans, specifications, and estimates (PS&E) must be approved before IRRHPP funds will be provided for construction.

§ 170.251 How do tribes apply for IRRHPP?

A tribe may apply for IRRHPP funds by submitting a complete application package to the Chief of BIADOT.

§ 170.252 What must an application for an IRRHPP include?

- The application must include:
- (a) Project scope of work (deliverables, budget, timeline);
 - (b) Amount of IRRHPP funds requested;

(c) Project information addressing ranking criteria identified in § 170.248, or the nature of the emergency/disaster;

(d) Documentation that the project is in the IRR Inventory, or in the case of an emergency/disaster application that it meets the definition of an IRR facility;

(e) Documentation of official tribal action requesting the IRRHPP project; and

(f) An FHWA-approved IRR TIP.

§ 170.253 Are there any transportation activities for which IRRHPP funds cannot be used?

Yes, IRRHPP funds cannot be used for transportation planning or research.

§ 170.254 Who ranks the IRRHPP projects?

BIADOT and FHWA rank IRRHPP projects.

§ 170.255 What is the IRRHPP Award list?

The award list is the ranked IRRHPP projects that have been identified for current year IRRHPP funds, assuming that all current year IRRHPP funds are available for non-emergency projects.

§ 170.256 What is the timeline for the IRRHPP, other than emergency/disaster projects, for any given fiscal year?

The timeline is as follows:

(a) BIADOT will accept applications through March 1 of each year. BIADOT notifies all applicants and Regions of receipt and completeness of application within 30 days of receipt;

(b) During May and June BIADOT and FHWA rank all complete applications;

(c) August 1 BIADOT notifies applicants of award;

(d) BIADOT transfers funds to respective Regions of selected IRRHPP projects no later than September 1;

(e) Regions must obligate funds by September 15; and

(f) September 16 BIADOT redistributes un-obligated funds.

§ 170.257 How does the award of an emergency/disaster project application affect projects on the IRRHPP Award List?

Emergency/disaster projects are funded from October 1—August 31. Projects on the IRRHPP Award List are funded based upon order of rank until current year funds are allocated to IRRHPP projects. Projects not funded will retain order of rank and be placed at the top of the award list the following year, without resubmission of application. Projects that were not ranked high enough to be placed on the IRRHPP Award List must be resubmitted.

Population Adjustment Factor (PAF)**§ 170.263 What is the PAF?**

The PAF is a special distribution calculated annually that provides for

broader participation in the IRR Program by tribes (or federally recognized governmental subdivision of a tribe that is authorized to administer

its own IRR funding) based upon the following population ranges and distribution factors (as further explained in Appendix B to subpart C):

Population range	Distribution factor	Number of tribes*	Funding amount per tribe (minimum base allocation)
Less than 25	1	N ₁	MBA × 1
25–100	3.5	N ₂	MBA × 3.5
101–1000	5.0	N ₃	MBA × 5.0
1001–10,000	6.5	N ₄	MBA × 6.5
10,000+	8	N ₅	MBA × 8

*The number of tribes in a given population range may vary from year to year.

§ 170.264 What is the distribution factor?

As shown in the table § 170.263, the distribution factor is the multiplier used to determine the relative PAF funding between the population ranges. For example, if \$1000 is available for the first population range (less than 25), then the second population range (25–100) will receive \$3,500 or 3.5 times the

amount available to the first population range.

§ 170.265 What funding levels are available for distribution based on the PAF?

When the yearly amount authorized and appropriated to the IRR program exceeds \$275,000,000, then 12.5% of the increase over \$275,000,000, after takedowns, is available for distribution.

§ 170.266 What is the Minimum Base Allocation (MBA)?

The MBA is the dollar value to be multiplied by the distribution factor for each population range to determine the distribution of the PAF. The MBA calculation is as follows:

$$MBA = \frac{\text{total amount available for PAF}}{(1 \times N_1) + (3.5 \times N_2) + (5 \times N_3) + (6.5 \times N_4) + (8 \times N_5)}$$

§ 170.267 What population data is used to determine the PAF?

The population data used to determine PAF is the same data as used for the Population component of the Relative Need Distribution Factor.

Relative Need Distribution Factor**§ 170.270 What is the Relative Need Distribution Factor?**

The Relative Need Distribution Factor is a mathematical formula for distributing the IRR construction funds using the following three factors: Cost-to-Construct (CTC), Vehicle Miles Traveled (VMT), and Population (POP). The Relative Need Distribution Factor is as follows:

$$A = \alpha \times \{CTC \div \text{Total C}\} + \beta \times \{VMT \div \text{Total VMT}\} + \delta \times \{POP \div \text{Total POP}\}$$

Where:

A = % Relative Need for an individual tribe

CTC = Total cost-to-construct calculated for an individual tribe

Total C = Total cost-to-construct calculated for all tribes shown in the IRR inventory

VMT = Total vehicle miles traveled for all routes in the IRR inventory for a given tribe

Total VMT = Total vehicle miles traveled for all routes in the IRR inventory

POP = Population of an individual tribe

Total POP = Total population for all tribes

α , β , δ = 0.50, 0.30, 0.20 respectively = Coefficients reflecting relative weight given to each formula factor

Example:

Tribe X has the following data:

CTC = \$51,583,000

Total CTC = \$10,654,171,742

VMT = 45,680

Total VMT = 10,605,298

POP = 4,637

Total POP = 1,010,236

$A = 0.50 [CTC \div \text{Total CTC}] + 0.30 [VMT \div \text{Total VMT}] + 0.20 [POP \div \text{Total POP}]$

$A = 0.50 [51,583,000 \div 10,654,171,742] + 0.30 [45,680 \div 10,605,298] + 0.20 [4,637 \div 1,010,236]$

$A = 0.00242 + 0.00129 + 0.00092$

$A = 0.00463$ or 0.463%

If construction funds available for the fiscal year are \$226,065,139, then the allocation amount would be:

$\$226,065,139 \times 0.00463 = \$1,046,682$

§ 170.271 What is the Cost-to-Construct component in the Relative Need Distribution Factor?

The Cost-to-Construct component measures the estimated cost of a tribe's transportation projects as a percentage of the estimated cost nationally of all tribes' transportation facilities. Costs are derived from the IRR inventory of eligible IRR transportation facilities

developed and approved by tribal governments through Long-Range Transportation Plans (LRTPs).

§ 170.272 What is the Cost-to-Construct for an individual tribe?

The Cost-to-Construct for an individual tribe is the sum of all project costs from the tribe's IRR Inventory.

§ 170.273 What is the BIA methodology of estimating construction costs for transportation facilities?

On an interim basis, the methodology for calculating the Cost-to-Construct is the simplified approach identified in the Cost-to-Construct (Appendix C of this subpart).

§ 170.274 How may BIA and FHWA revise the method for calculating the Cost-to-Construct component of the Relative Need Distribution Factor?

BIA and FHWA, in partnership with the IRR Program Coordinating Committee, will consider revising the method for calculating the Cost-to-Construct component of the Relative Need Distribution Factor. BIA and FHWA may incorporate the following elements in the new methodology:

(a) Include costs for all eligible IRR projects, including transportation facilities that are not roads or bridges;

(b) Take into account regional cost differences while maintaining the integrity of the system by, for example, using an average of local tribal costs,

national tribal costs, and the state project costs from the tribe's local area to derive the underlying cost data from which estimates are generated;

(c) Generate and report total costs by project and tribe;

(d) Create templates that can be easily used at the tribal level;

(e) Include as project costs:

- (1) Project Planning;
- (2) Project Administration;
- (3) Preliminary Engineering;
- (4) Construction;
- (5) Project Bid Items;
- (6) Construction Engineering;
- (7) Quality Control; and
- (8) Permits, fees and taxes.

§ 170.275 What is the source of the construction cost used to generate the CTC?

The construction cost is derived from the average of the following three project bid tabulation sources:

- (a) Tribal bid tabulations;
- (b) State bid tabulations for the region of the State in which the tribe's project will be constructed;
- (c) National IRR programs bid tabulations; and
- (d) If one or more of these bid tabulation sources is unavailable, use the average of the available sources.

§ 170.276 Do all IRR facilities identified in the IRR Inventory count in the Relative Need Distribution Factor at 100% of their CTC and VMT?

No. The CTC and VMT for any facility that is included in or added to the IRR Inventory and is eligible for funding for construction or reconstruction with Federal funds, other than IRR or Public Lands Highways (PLH) funds, must be computed at the non-federal share requirement for matching funds. If, however, the facility falls into one or more of the following categories, then the CTC and VMT factors must be computed at 100%:

- (a) All transportation facilities approved and included in the BIA system for funding purposes prior to these regulations; or
- (b) Any facility that is not eligible for funding for construction or reconstruction with Federal funds, other than IRR or PLH funding; or
- (c) The state, municipality, county, or federal agency provides certification of inability to provide funding for the project and agrees to maintain the completed project under 23 U.S.C. 116.

§ 170.278 What is the VMT component of the Relative Need Distribution Factor and how is it calculated?

VMT is a measure of the IRR transportation system use. VMT is calculated using the sum of the length

of IRR route segments in miles multiplied by the Average Daily Traffic (ADT) of the route segment.

§ 170.279 What IRR route segments are used to calculate VMT?

All IRR route segments in the IRR Inventory are used to calculate VMT, but percentage factors are applied.

§ 170.282 What is the Population component of the Relative Need Distribution Factor and how is it determined?

The population component is a factor used to define transportation need based on the number of American Indian or Alaska Native people served. On an interim basis, the population component will use data that is the on- and near-reservation service area population from the most recently published BIA Labor Force Report. The population data of the American Indian and Alaska Native Service Population developed by the Department of Housing and Urban Development, pursuant to the Native American Housing Assistance and Self-Determination Act (NAHASDA), will become the population component used, after the NAHASDA data is updated to reflect the 2000 or subsequent census data.

General Data Appeals

§ 170.285 May a tribe challenge the Cost-to-Construct, Vehicle Miles Traveled, and Population data BIA uses in the Relative Need Distribution Factor?

Yes, a tribe may submit a request to the Regional Director that it revise the data for the tribe that BIA uses in the Relative Need Distribution Factor. Such a request must include any relevant data in the tribe's possession, together with written support for its contention that such data is more accurate than the data the BIA uses for the tribe. The Regional Director must respond within 30 days of receipt of a Relative Need Distribution Factor data correction request.

§ 170.286 When may a tribe submit a Relative Need Distribution Factor data correction request?

A tribe may submit a data correction request at any time. In order to impact the distribution in a given fiscal year, a data correction request must be approved, or any subsequent appeals resolved, by June 1 of the prior fiscal year.

§ 170.287 When must a data correction request be approved?

Unless the Regional Director determines that the existing BIA data is more accurate, the Regional Director must approve the tribe's data correction

request and accept the tribe's corrected data. If the Regional Director disapproves the tribe's request, the Regional Director's decision must include a detailed written explanation of the reasons for the disapproval, copies of any supporting documentation the Regional Director relied upon in reaching the decision (other than the tribe's request), and notice of the tribe's right to appeal the decision. If the Regional Director does not approve the tribe's request within 30 days of receipt of the request, the request must be deemed disapproved.

§ 170.288 How does a tribe appeal a disapproval from the Regional Director?

(a) Within 30 days of receipt of a disapproval, or within 30 days of a disapproval by operation of law, a tribe may file a written notice of appeal to the Deputy Commissioner of Indian Affairs, with a copy served upon the Regional Director; and

(b) Within 30 days of receipt of an appeal, the Deputy Commissioner must issue a written decision upholding or reversing the Regional Director's disapproval. Such a written decision must include a detailed written explanation of the reasons for the disapproval, copies of any supporting documentation the Deputy Commissioner relied upon in reaching the decision (other than the tribe's request or notice of appeal), and notice of the tribe's right to appeal the decision to the Interior Board of Indian Appeals pursuant to 25 CFR part 2.

IRR Inventory and Long-Range Transportation Planning (LRTP)

§ 170.290 How is the IRR Inventory used in the Relative Need Distribution Factor?

The IRR Inventory as defined in § 170.445 identifies the transportation need by providing the data used to generate the CTC and VMT components of the Relative Need Distribution Factor.

§ 170.291 How is the IRR inventory developed?

The IRR Inventory is developed through the LRTP process, as defined in § 170.427.

§ 170.292 Are all facilities included in the IRR Inventory used to calculate CTC?

No, projects that have been constructed to their design standard are not eligible for inclusion for purposes of applying the CTC portion of the formula for a period of 5 years after completion of the project.

§ 170.294 Is there a difference for funding purposes between the old BIA Roads Inventory and the IRR Inventory?

Yes, the IRR Inventory defined in this part expands the BIA Roads Inventory for funding purposes, it includes:

- (a) All roads, bridges, and other eligible transportation facilities that were previously approved in the BIA system inventory in 1992 and each subsequent year thereafter;
- (b) All miles of road that have been constructed using Highway Trust Funds (IRR) since 1983;
- (c) All IRR routes;
- (d) Non-road facilities; and
- (e) Other IRR eligible projects.

§ 170.295 Who is responsible for maintaining the National IRR Inventory Database?

BIA Regional offices are responsible for maintaining, certifying, and entering the data for their region's portion of the National IRR Inventory Database.

§ 170.296 How is the IRR Inventory kept accurate and current?

The IRR Inventory data for a tribe is updated on an annual basis as follows:

- (a) The BIA Regional Offices provide the tribes in the region a copy (electronic and hard copy) of the IRR Inventory by November 1st of each year;
- (b) The tribe may review the data and advise the Regional Office of errors or omissions. The tribe submits additions and deletions to the IRR Inventory along with authorizing resolutions by May 1;
- (c) The BIA Regional Office reviews the tribes' submission for errors or omissions and provides the tribes with their revised inventories by July 1;
- (d) The tribe must correct any errors or omissions by August 1;
- (e) The BIA Regional Offices certify the data and enter the data into the national IRR Inventory database. Certification of the data must be completed by September 1 for use in the Relative Need Distribution Factor for the following fiscal year;

(f) BIA provides the tribes with a copy (electronic and hard copy) of the Relative Need Distribution Factor distribution percentages by October 1; and

(g) The BIA DOT will approve all submissions from the BIA Regional Offices for inclusion into the National IRR Inventory.

§ 170.297 Is transportation planning included in the IRR Inventory and IRR Transportation Improvement Program (TIP)?

No, only project-specific transportation activities are included in the Inventory and TIP.

§ 170.298 Why exclude transportation planning from the TIP and the IRR Inventory?

Including routine transportation planning creates an undue administrative burden on BIA and tribes. The Inventory is used to generate the CTC and VMT components of the Relative Need Distribution Factor. Excluding non-project related planning does not affect the integrity of the inventory.

§ 170.299 What are the responsibilities of the IRR Program Coordinating Committee for funding issues?

Committee responsibilities are to provide input and recommendations to BIA and FHWA during the development or revision of:

- (a) New IRR Inventory Data Format and Form;
- (b) Simplified Cost to Construct Methodology;
 - (1) Formula Calculations;
 - (2) Formula Program and Design;
 - (3) Bid Tab Methodology;
 - (c) Cost Elements, not just roads;
 - (d) Over-Design Issues;
 - (e) Inflation Impacts on \$1 Million Cap for IRRHPP and Emergency Projects;
 - (1) IRRHPP Ranking System;
 - (2) Emergency/disaster expenditures Report; and
 - (f) Impact of including funded but non-constructed projects in CTC calculation.

Long-Range Transportation Planning**§ 170.300 How does the LRTP process relate to the Relative Need Distribution Factor?**

The LRTP process, as explained in subpart D (§ 170.427—170.432) is a uniform process by which the transportation needs and priorities of the tribes are identified. The IRR Inventory is derived from projects identified through the LRTP. It is also a means for identifying projects for the IRRHPP Program.

§ 170.301 Are there cost constraints in the transportation needs identified in the LRTP?

No, since the purpose of the LRTP is to identify need, it is not constrained by costs.

§ 170.302 What are the minimum requirements for a tribe's LRTPs?

- At a minimum, the LRTP must:
 - (a) Document the tribe's public involvement;
 - (b) List the tribe's eligible IRR projects, costs estimates, and VMT data;
 - (c) Include inventory data forms for eligible IRR projects;
 - (d) Describe the tribe's strategy for meeting its transportation need;

(e) Provide documentation from other agencies regarding coordination of projects involving the other agencies; and

(f) Attach official tribal endorsement of LRTP.

§ 170.303 Are all transportation projects identified on the tribe's LRTP used to calculate the tribe's allocation of the national allocation?

No, the tribe's LRTP may include any transportation need or project of the tribe, but only eligible IRR facilities are included in the IRR Inventory and used to calculate the tribe's allocation.

Flexible Financing**§ 170.350 May tribes use flexible financing to finance IRR transportation projects?**

Yes, Tribes are entitled to use the flexible financing provisions in Title 23 U.S.C. in the same manner as States to finance IRR transportation projects, unless otherwise prohibited by law.

§ 170.351 How may tribes finance IRR transportation projects that secure payment with IRR funds?

Tribes may issue bonds or enter into other debt financing instruments under 23 U.S.C. 122 with the expectation of payment of IRR funds to satisfy the instruments.

170.352 Can the Secretary of Transportation execute a federal credit instrument to finance IRR projects?

Yes, under 23 U.S.C. 182 and 183, the Secretary of Transportation may enter into an agreement for secured loans or lines of credit for IRR projects meeting the requirements contained in 23 U.S.C. 182. Tribes or BIA may service federal credit instruments. The secured loans or lines of credit must be paid from tolls, user fees, or other dedicated revenue sources.

§ 170.353 Can a tribe use IRR funds as collateral?

Yes, a tribe can use IRR funds as collateral for loans or bonds to finance IRR projects. Upon the request of a tribe, the BIA region will assist the tribe by providing necessary documentation to banks and other financial institutions.

170.354 Can a tribe use IRR funds to leverage other funds?

Yes, a tribe can use IRR funds to leverage other funds.

170.355 Can BIA regional offices borrow IRR funds from each other to assist in the financing and completion of an eligible IRR project?

Yes, Regional offices, in consultation with tribes, may enter into agreements to borrow IRR funds to assist another BIA regional office in financing the

completion of IRR projects. These funds must be repaid within the next fiscal year. No such agreements can be executed during the last year of a transportation authorization act unless IRR funds have been authorized for the next year.

§ 170.356 Can a tribe use IRR funds to pay back loans?

A tribe may use IRR funds to pay back loans or other finance instruments for a project that:

(a) The tribe paid for in advance of the current year using non-IRR Program funds; and

(b) Was included in FHWA-approved IRR TIP.

§ 170.357 Can a tribe apply for loans or credit from a state infrastructure bank?

Yes. Upon the request of a tribe, the BIA region will provide necessary documentation to a state infrastructure bank to facilitate obtaining loans and other forms of credit for an IRR project. A state infrastructure bank is a state or multi-state fund that can offer loans and other forms of credit to help project sponsors, such as tribes, pay for transportation projects.

APPENDIX A TO SUBPART C—IRR HIGH PRIORITY PROJECT SCORING MATRIX

Score	10	5	3	1	0
(a) Accident and fatality rate for proposed route ¹ .	Severe		Moderate	Minimal	No accidents.
(b) Years since last IRR construction project completed.	Never	Last project more than 10 years ago.	Last project 5-9 years ago.	Last project within last 1 to 4 years.	Currently has project.
(c) Readiness to Proceed to Construction or IRRBP Design Need.	PS&E Complete	Bridge Replacement PS&E development project.	Bridge Rehabilitation PS&E development project.		No other funds.
(d) Percentage of project matched by other funds.		80% or more by other funds.	20–79% by other funds.	1–19%	Over 750,000.
(e) Amount of funds requested.		250,000 or less	250,001–500,000	500,001–750,000	
(f) Geographic isolation	No external access to community.	Substandard Primary access to community.	Substandard Secondary access to community.	Substandard access to tribal facility.	
(g) All weather access for: (1) employment (2) commerce (3) health (4) safety (5) educational resources (6) 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.

Note: In the event of a tie, the IRR Program Coordinating Committee will determine which project is funded considering accident rates, no prior project, and no access, and available funding.

Appendix B to Subpart C—Population Adjustment Factor

The Population Adjustment Factor allows for participation in the IRR Program by all tribes. This funding formula reservation allocates a set amount of funds each fiscal year to a tribe based on the population range within which the tribe is included, as follows:

EXAMPLE USING \$350 MILLION AUTHORIZATION

Population range (step)	No. of tribes	Distribution factor	Step factor	Funding per tribe	Total funding per step
Less than 25	17	1	17	\$3,216	\$54,665
25–100	66	3.5	231	11,255	742,797
101–1000	309	5	1545	16,078	4,968,059
1001–10,000	137	6.5	890	20,901	2,863,467
10,000+	29	8	232	25,725	746,013
Total			¹ 2,915.50		9,375,000

¹ Total step factor.

The steps to calculate the Population Adjustment Factor are applied as follows:

(a) For each population range, multiply the Distribution Factor by the total number of tribes identified in the population range (Step);

(b) Sum the products of the multiplication in step 1 above to derive a Total Step Factor; Calculate the Difference between the IRR Authorization for the Allocation Year and the 1999 IRR Authorization (\$275 Million);

(c) Derive an Annual Adjustment Factor by dividing 12 1/2% of the Difference (step 3 above) by the Total Step Factor; and
(d) Calculate Population Adjustment Factor within each Population Range by multiplying the Distribution Factor for the Population Range by the Annual Adjustment Factor.

The mathematical equation for the Population Adjustment Factor calculation is as follows:

$$PAF_n = DF_n \times \left(\frac{12\frac{1}{2}\% \times (\$A - \$275MM)}{\sum (N_1 \times DF_1 \dots N_5 \times DF_5)} \right)$$

PAF = Population Adjustment Factor
 DF = Distribution Factor
 \$A = IRR Authorization in Allocation Year

\$275MM = IRR Authorization in 1999
 n = The nth Population Range
 1...5 = Population Ranges 1 through 5

N_n = Number of Tribes in the nth Population Range

For example, for $DF_1 = 1.00$; $\$A = \$350MM$; $PAF_1 = 1.00 \times \frac{\$9,375,000}{2,915.50} = \$3,215.57$

For example, for $DF_3 = 5.00$; $\$A = \$350MM$; $PAF_3 = 5.00 \times \frac{\$9,375,000}{2,915.50} = \$16,077.86$

The Minimum Base calculation is as follows:

$$MBA = \left(\frac{12\frac{1}{2}\% \times (\$A - \$275MM)}{(N_1 + 3.5N_2 + 5N_3 + 6.5N_4 + 8N_5)} \right)$$

MBA = Minimum Base Allocation
 Distribution Factors = 1, 3.5, 5, 6.5, and 8
 \$A = IRR Authorization in Allocation Year
 n = The nth Population Range
 1...5 = Population Ranges 1 through 5

N_n = Number of Tribes in the nth Population Range
 The Population Adjustment Factor (PAF) calculation is as follows:
 $PAF_n = MBA \times Df_n$
 PAF = Population Adjustment Factor
 MBA = Minimum Base Allocation

DF = Distribution Factor
 n = The nth Population Range
 1...5 = Population Ranges 1 through 5
 Examples of the Population Adjustment Factor calculation for \$350 Million Authorization:

$$MBA = \frac{12\frac{1}{2}\% \times (\$350MM - \$275MM)}{17 + 3.5(66) + 5(309) + 6.5(137) + 8(29)} = \frac{\$9,375,000}{2,915.50} = \$3,215.57$$

$PAF_n = MBA \times Df_n$
 $PAF_1 = \$3,215.57 \times 1.00 = \$3,215.57 =$
 PAF Funding per Tribe for Step 1

$PAF_2 = \$3,215.57 \times 3.50 = \$11,254.50 =$
 PAF Funding per Tribe for Step 2
 $PAF_3 = \$3,215.57 \times 5.00 = \$16,077.86 =$
 PAF Funding per Tribe for Step 3

$PAF_4 = \$3,215.57 \times 6.50 = \$20,901.22 =$
 PAF Funding per Tribe for Step 4
 $PAF_5 = \$3,215.57 \times 8.00 = \$25,754.58 =$
 PAF Funding per Tribe for Step 5

POPULATION ADJUSTMENT FACTOR CALCULATED FOR \$300 MILLION AUTHORIZATION

[Authorization—\$300,000,000; Increase > \$275MM, \$25,000,000; Pop. Adj. Factor—\$3,125,000]

Population range	No. of tribes	Distribution factor	Step factor	Funding per tribe	Total funding for population range
0 to 24	17	1.00	17.0	\$1,071.86	\$18,222
25 to 100	66	3.50	231.0	3,751.50	247,599
101 to 1,000	309	5.00	1,545.0	5,359.29	1,656,020
1,001 to 10,000	137	6.50	890.5	6,967.07	954,489
10,000+	29	8.00	232.0	8,574.86	248,671
Pop. adj. factor: 3,125,000	558		¹ 2,915.5		3,125,000

¹ Total step factor.

Appendix C to Subpart C—Cost-to-Construct

(Appendix C includes Tables 1–7)

This method utilizes the basic concepts of the Bureau of Indian Affairs' "*Simplified Approach to Compute the Cost-to-Construct*". The BIA concept has been modified, under this proposed method, to include computing costs for High Capacity Roads (multi-lane roads), non-road projects (snowmobile trails, boardwalks, footpaths, etc.) and other eligible projects.

This method offers a straightforward approach to calculate the Cost-to-Construct and is relatively easy to check. The theory behind this method is that the inventory and

project need databases are used to determine, within reasonable limits, the costs of a new transportation facility or in the case of an existing facility, the existing condition of the facility and the costs that will be necessary to construct the facility to an adequate standard. For example, the Cost-to-Construct for a particular section of IRR system road is the cost required to improve the road's existing condition to a condition that would meet the Adequate Standard Characteristics. (see Table 1) Further, the standards for the geometrics and surface type for a roadway vary based on the road's functional classification, average daily traffic, and terrain. The Adequate Standard Characteristics table also includes standards

for High Capacity roads and intermodal facilities.

The simplified approach will use cost indexes for five categories of cost. Four of the categories are Grade and Drain Costs, Aggregate Costs, Pavement Costs, and Incidental Costs. Information from the inventory database must provide an indication of the need for construction in each of these four categories. The fifth category, Bridge Costs, are derived from the BIA Bridge Study. The simplified approach includes no systematic method for indexing Rights-of-Way, Bridge, other pre-construction costs, and other transportation facilities.

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TABLE 2.—FUTURE SURFACE TYPE

Const. need	Adequate Std. No.	BIA system class	Class No.	ADT +20	Surface type
4	1, 2, 3, 4, 5, 6	Rural Minor Arterials	2	400–10,000	Paved.
4	16, 17, 18	Rural Major Arterials	1	> 10,000	Paved.
4	10, 11, 12	Rural Locals	5	51–399	Gravel.
4	13	Minor Arterial	4	400–10,000	Paved.
4	14	Collector	4	251–399	Paved.
4	15	Local	3	50–250	(Earth, Gravel, Paved)*.
1	7, 8, 9	Rural Major Collector	4	< 50	Earth.
				**50–250	Gravel.
				>250	Paved.
1	10, 11, 12	Rural Locals	5	< 50	Earth.
				**50–250	Gravel.
				**>250	Paved.
1	15	Local	3	< 50	Earth.
				**50–250	Gravel.
				**>250	Paved*.

* Local class 3 roads may be earth, gravel or paved depending on tribal customs, economics or environmental conditions.

** Use default ADT +20 where impractical to acquire ADT's or ADT is zero. Where volumes are practical to acquire, they should be acquired, and traffic projected at 2% per year.

A. Basic Procedures

1. A long-range plan must be developed for those tribes without data or that lack inventory data and updated for those tribes that have existing inventory systems. The plan would identify the system, collect the inventory data and create cost estimates for all "Needs." Once the inventory database is current and project need is identified, the cost-to-construct for those projects can be developed. The method for determining the estimated cost to construct of a proposed transportation project is accomplished through the following step-by-step process:

(a) Determine Future Surface Type for project (see table 2);

(b) Calculate 20 year Projected ADT based upon tribal economic and transportation development planning;

(c) Determine Class of project, e.g., local, rural local, rural major collector, other, utilizing projected ADT;

(d) Identify project terrain as flat, rolling, or mountainous;

(e) Identify Adequate Standard Characteristics (ASC) by applying Class, 20 year Projected ADT, and Terrain to ASC (see Table 1);

(f) Identify the project's estimated construction cost per standard industry measurement (SIM) (e.g., cost per mile, cost per linear foot) for the following components of construction: Aggregate, Paving, Grade/Drain, and Incidental (see tables 3–7);

(g) Multiply the estimated construction cost per SIM for each component of construction by the length of the route or proposed project to determine the estimated cost for each component of construction; and

(h) Calculate the estimated cost for the route or proposed project by adding together the estimated costs for each component of construction.

2. The method for determining the estimated cost to reconstruct or rehabilitate an existing transportation project is determined in the same manner as a proposed transportation project, except that the existing condition of the project is evaluated to determine the percentage to be applied to the estimated cost for each

component of construction that will be included in the estimated cost for reconstruction:

(a) Evaluate existing condition of road or reconstruction project in accordance with applicable management systems, guidelines or other requirements;

(b) Identify percentage of allowable estimated cost for each component of construction by applying the Adequate Standards Characteristics (ASC) and existing condition to the percent cost requirement tables for aggregate, paving, grade/drain, incidental, and bridge;

(c) Multiply estimated construction cost for each component of construction by the corresponding percentage of allowable estimated cost to determine the estimated reconstruction cost for each component; and

(d) Calculate the estimated reconstruction cost by adding together the estimated reconstruction costs for each component of construction.

3. The Average Daily Traffic (ADT) for existing and proposed roads is determined by measuring either actual traffic counts, estimated traffic counts based on industry standard modeling methods, or the following default values: Functional Class 2 roads is 100 ADT, Functional Class 3 roads is 50 ADT, Functional Class 3 Streets-roads is 25 ADT, and Functional Class 4 motorized Trails is 20 ADT. Functional Class 1 roads must have an actual ADT greater than 10,000. This traffic count data is incorporated into the IRR road inventory for application into the RNF Cost-to-Construct calculations.

4. The 20-year projected ADT is calculated using growth rates established by current industry models or by a minimum default using a 2% growth rate, except where the default is used for ADT then the following values apply: Class 2 roads is 100 ADT+20, Class 4 roads is 50 ADT+20, Class 3 (Streets) is 25 ADT+20, and Motorized Trails is 20 ADT+20.

5. Functional Classification. As a part of the IRR Inventory system management, all facilities included on or added to the IRR System must be classified according to the following functional classifications as follows (Ref. § 170.456):

(a) *Class 1:* Major arterial roads providing an integrated network with characteristics for serving traffic between large population centers, generally without stub connections and having average daily traffic volumes of 10,000 vehicles per day or more with more than two lanes of traffic.

(b) *Class 2:* Major or minor arterial roads providing an integrated network having the characteristics for serving traffic between large population centers, generally without stub connections. May also link smaller towns and communities to major resort areas which attract travel over long distances and generally provide for relatively high overall travel speeds with minimum interference to through traffic movement. Generally provide for at least inter-county or inter-State service and are spaced at intervals consistent with population density. This class of road will have less than 10,000 vehicles per day.

(c) *Class 3:* Streets-roads which are located within communities serving residential and other urban type settings.

(d) *Class 4:* Section line and/or stub type roads which collect traffic for arterial type roads, make connections within the grid of the IRR system. This class of road may serve areas around villages, into farming areas, to schools, tourist attractions, or various small enterprises. Also included are roads and motorized trails for administration of forest, grazing mining, oil, recreation, or other utilization purposes. This classification encompasses all those public roads not falling into either the Class 2 or 3 definitions above.

(e) *Class 5:* This classification encompasses all non-road type paths, trails, walkways, or other designated types of routes for public use by foot traffic, bicycles, trail bikes, or other uses to provide for general access of non-motorized traffic.

(f) *Class 6:* This classification encompasses other modes of transportation such as public parking facilities adjacent to IRR routes and scenic byways, rest areas, and other scenic pullouts, ferry boat terminals, and transit terminals.

(g) *Class 7:* This classification encompasses airstrips which are within the boundaries of the IRR system grid and are open to the

public. These airstrips are included for inventory and maintenance purposes only.

6. Grade and Drain costs include the cost for constructing a roadbed to an adequate standard and providing adequate drainage. Specifically it includes the necessary earthwork to build the roadbed to the required horizontal and vertical geometric parameters above the surrounding terrain and provide for proper drainage away from the foundation with adequate cross drains. Table 3 presents a summary of the proposed method of estimating grade and drain costs based on the existing roadbed condition observed in the inventory update. To implement this proposed procedure, a one-digit data field in the inventory database needs to be created for roadbed condition.

TABLE 3.—PERCENT GRADE AND DRAIN COST REQUIRED

Roadbed condition	Percent ¹
Proposed Road	100
Primitive Trail	100
Bladed Unimproved Earth Road, Poor Drainage, Poor Alignment	100
Minimum Built-up Roadbed (Shallow cuts and fills) with inadequate drainage and alignment that generally follows existing ground	100
A designed and constructed roadbed with some drainage and alignment improvements required	100

TABLE 3.—PERCENT GRADE AND DRAIN COST REQUIRED—Continued

Roadbed condition	Percent ¹
A roadbed constructed to the adequate standards with good horizontal and vertical alignment and proper drainage	0
A roadbed constructed to adequate standards with curb and gutter on one side	0
A roadbed constructed to adequate standards with curb and gutter on both sides	0

¹ Percent grade and drain cost required.

B. Aggregate Costs

The costs of providing the surface or subsurface defined by the adequate standard will vary depending on the type of surface required. (see Table 1)

TABLE 4.—PERCENT AGGREGATE COST REQUIRED

[Table 4 summarizes the percentage of aggregate costs for all possible scenarios of existing conditions and recommended surface conditions]

Existing surface type	Future surface type		
	Paved (percent)	Gravel (percent)	Earth (percent)
Adequate Standard Surface			
Proposed	100	100	0
Primitive	100	100	0
Earth	100	100	0
Gravel	100	100	0
Bituminous <2"	100	0	0
Bituminous >2"	0 or 100*	0	0
Concrete	0 or 100*	0	0

* If the condition of the surface requires reconstruction then use 100% of aggregate cost.

C. Pavement (Surface) Costs

Table 5 summarizes the percentage of pavement (surface) costs for existing conditions and recommended surface types. Pavement overlays are calculated at 100 percent of the pavement costs.

TABLE 5.—PERCENT OF SURFACE COST REQUIRED

Existing surface type	Future surface type		
	Paved (percent)	Gravel (percent)	Earth (percent)
Adequate Standard Surface			
Proposed	100	100	0
Primitive	100	100	0
Earth	100	100	0
Gravel	100	100	0
Bituminous <2"	100	0	0
Bituminous >2"	0 or 100*	0	0
Concrete	0 or 100*	0	0

* If the condition of the surface requires reconstruction then use 100% of surface cost.

D. Incidental Costs

1. The following incidental cost items are generally required if a project includes construction or reconstruction of the roadbed.

- (a) Clearing and Grubbing.
- (b) Construction Surveying.
- (c) Construction Inspection.

- (d) Materials Testing.
- (e) Mobilization.
- (f) Guard Rails.
- (g) Miscellaneous Pipe.
- (h) New Traffic Control Devices.
- (i) Signage.
- (j) Other Minor Incidentals.
- (k) Concrete Barriers.
- (l) Obstruction Removal.

- (m) Pavement Removal.
- (n) Temporary Traffic Control.
- (o) Construction Inspection.
- (p) Material Testing.
- (q) Mobilization.
- (r) New Traffic Control.
- (s) Temporary Traffic Control.
- (t) Fencing.
- (u) Landscaping.

(v) Structural Concrete.
(w) Traffic Signals.
(y) Utilities.

2. Table 6 accounts for those incidental construction costs normally found on a typical project. If any of the other items are

required as show in Table 7, the appropriate percentage should be added to the percentage in Table 6.

TABLE 6.—PERCENT INCIDENTAL CONSTRUCTION COST REQUIRED

Roadbed condition	New alignment (in percent)	Maintenance of traffic re- quired (in percent)
Proposed Road	65	N/A
Primitive Trail	65	N/A
Bladed Unimproved Earth Road, Poor Drainage, Poor Alignment	65	N/A
Minimum Built-up Roadbed (shallow cuts and fills) with inadequate drainage and alignment that generally fol- lows existing ground	N/A	75
A designed and constructed roadbed with some drainage and alignment improvements required	N/A	75
A roadbed constructed to the adequate standards with good horizontal and vertical alignment and proper drainage. Requiring surfacing	N/A	30
A roadbed constructed to adequate standards with curb and gutter on one side. Requiring surfacing	N/A	30
A roadbed constructed to adequate standards with curb and gutter on both sides. Requiring surfacing	N/A	30

TABLE 7.—PERCENT ADDITIONAL INCIDENTAL CONSTRUCTION COSTS

Fencing	1% of Total Incidental Construction Costs.
Landscaping	9% of Total Incidental Construction Costs.
Structural Concrete	9% of Total Incidental Construction Costs.
Traffic Signals	3% of Total Incidental Construction Costs.
Utilities	3% of Total Incidental Construction Costs.

Subpart D—Planning, Design, and Construction of Indian Reservation Roads Program Facilities

Transportation Planning

§ 170.400 What is the purpose of transportation planning?

Transportation planning develops a vision of the future which guides decision-making today. The transportation planning process results in a short- and long-range transportation plan. The purpose of transportation planning is to fulfill goals by developing strategies to meet transportation needs. These strategies address current and future land use, economic development, traffic demand, public safety, health, and social needs.

§ 170.401 What transportation planning functions and activities must BIA perform for the IRR Program?

The activities and functions that BIA must perform for the IRR Program are:

- (a) Preparing the regional IRR TIP and IRR Inventory data updates as required;
- (b) Coordinating with States and their political subdivisions, metropolitan planning offices (MPO's) and rural planning offices (RPO's) on IRR regionally significant projects;
- (c) Providing technical assistance to tribal governments and developing IRR budgets including transportation planning cost estimates;
- (d) Facilitating public involvement and participating in planning and other transportation-related meetings;

- (e) Performing traffic studies, preliminary project planning, and special transportation studies;
- (f) Developing short and long-range transportation plans;
- (g) Mapping;
- (h) Developing and maintaining management systems;
- (i) Transportation planning for operational and maintenance facilities; and
- (j) Researching of rights-of-way documents for project planning.

§ 170.402 What transportation planning functions and activities must tribes perform under a self-determination contract or self-governance agreement?

Tribes must prepare a tribal TIP (TTIP). Tribes may also perform other transportation planning activities such as:

- (a) Coordinating with States and their political subdivisions, MPO's and RPO's on IRR regionally significant projects;
- (b) Preparing IRR Inventory data updates;
- (c) Obtaining public involvement;
- (d) Performing traffic studies;
- (e) Developing short- and long-range transportation plans;
- (f) Mapping;
- (g) Developing and maintaining tribal management systems;
- (h) Participating in transportation planning and transportation-related land use planning and other transportation related meetings;
- (i) Performing transportation planning for operational and maintenance facilities;

- (j) Developing IRR budget, including transportation planning cost estimates;
- (k) Performing special transportation studies, as appropriate;
- (l) Researching rights-of-way documents for project planning; and
- (m) Performing preliminary project planning.

170.403 Who performs transportation planning for the IRR Program?

BIA and tribal governments perform transportation planning for the IRRProgram.

§ 170.404 What IRR funds can be used for transportation planning?

Up to 2 percent of the IRR funds are reserved for transportation planning for tribal governments as provided for under section 204(j) of Title 23. A tribe may make a request to the BIA regional office to enter into a self-determination contract or self-governance agreement for transportation planning activities and functions under the ISDEAA, or it may request a travel authorization to attend transportation planning functions and related activities using these funds.

§ 170.405 How must tribes use planning funds?

IRR 2 percent transportation planning funds are only available for tribal governments. These funds support the development and implementation of the tribal transportation planning process and associated strategies for identifying their intermodal transportation needs. This can include attending

transportation planning meetings, pursuing other sources of funds, development of the tribal priority list or any of the transportation functions/activities as defined in the IRR Transportation Planning Policy Guide (TPPG).

§ 170.406 Can IRR construction funds be used for transportation planning activities?

Yes, Tribes may identify transportation planning as a priority in their tribal priority list or TTIP. Tribes may use up to 100 percent of their IRR construction funds for transportation planning.

§ 170.407 Can IRR 2 percent planning funds be used for road construction and other projects?

Yes, any tribe can request to have its planning funds transferred into construction funds for use on any eligible and approved IRR project.

§ 170.408 What happens to 2 percent planning funds unobligated after August 15?

Once all tribal governments' requests for 2 percent funds have been satisfied for a given fiscal year the BIA regional office may roll the unobligated balances into construction funds after consultation with the affected tribal governments.

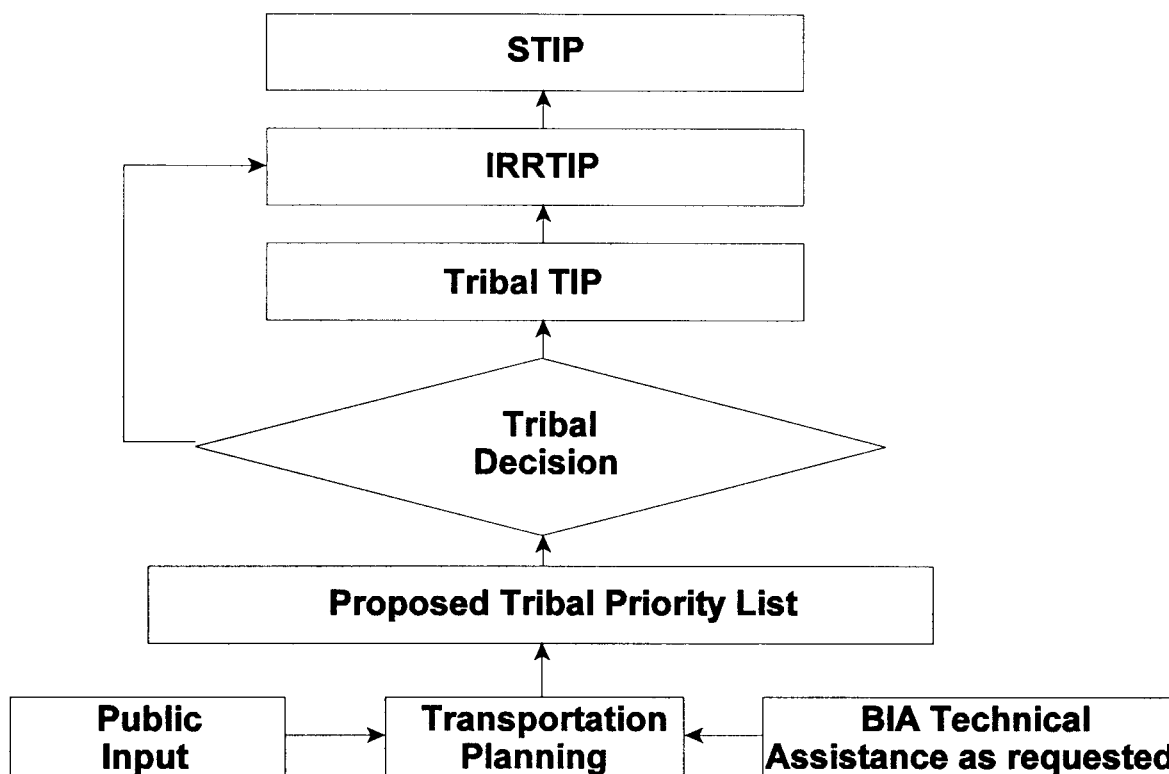
§ 170.409 What is pre-project planning?

Pre-project planning includes the activities conducted before project approval on the IRR TIP. Such activities include preliminary project cost estimates, certification of public involvement, cooperation with States and/or MPO's for a regionally significant project, preliminary needs assessments, and preliminary environmental and archeological reviews for the development of the project.

§ 170.410 How is the IRR Program transportation planning funded?

As provided in 23 U.S.C. 204, IRR Program funds are available for transportation planning.

The Transportation Improvement Program Process Chart follows:



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§ 170.411 What is the State Transportation Improvement Program (STIP)?

The State Transportation Improvement Program is a financially constrained, multi-year list of transportation projects. The STIP is developed under 23 U.S.C. 134 and 135, and 49 U.S.C. 5303–5305. The Secretary of Transportation (FTA and FHWA) reviews and approves these documents for each state. Approval of the STIP gives authority to expend Highway Trust Funds for those projects.

§ 170.412 What is the Indian Reservation Roads Transportation Improvement Program (IRR TIP)?

The IRR TIP is a multi-year, financially constrained list by year, State, and tribe of IRR-funded projects selected by tribal governments from tribal TIPs, or other tribal actions, that are programmed for construction in the next 3 to 5 years. Information from the tribal TIP concerning non-IRR funded projects may be attached to the IRR TIP for inclusion into the STIP.

§ 170.413 What is the Tribal Transportation Improvement Program (TTIP)?

The TTIP is a multi-year, financially constrained list of proposed transportation projects. It may be developed from the tribal priority list. The TTIP should be consistent with the tribal long-range transportation plan and must contain all Indian Reservation Roads (IRR) funded projects. It is reviewed and updated as necessary. The only entity that can change the TTIP is the Indian tribal government. The TTIP is forwarded to the BIA by resolution or

by tribally authorized government action for inclusion into the IRR TIP.

§ 170.414 Must the eligible projects on the tribal TIP be included in the IRR TIP?

Yes, eligible projects on the tribal TIP must be included in the IRR TIP.

§ 170.415 What happens to the tribal TIP after eligible projects are included in the IRR TIP?

The Secretary and the Secretary of Transportation review and approve the IRR TIP. The IRR TIP, as approved by the Secretaries, is then included in the STIP without further action. Approval of the IRR TIP authorizes expenditure of IRR highway construction funds for those projects.

§ 170.416 What are the responsibilities of the BIA prior to the IRR TIP being included in the STIP?

The BIA regional office must work cooperatively with tribal, state, rural, and metropolitan transportation planning organizations concerning the leveraging of funds from non-IRR sources and identification of other funding sources in order to expedite the planning, design and construction of projects on the IRR TIP.

§ 170.417 How are projects placed on the TTIP and IRR TIP?

Each project is placed on the TTIP and IRR TIP as follows:

(a) The TTIP may be developed from either the tribal priority list or the long-range transportation plan. The TTIP identifies the implementation year of each project scheduled to begin within the next 3–5 years. It is the tribal government's decision to select the year in which projects are programmed. The TTIP may also contain information regarding other Federal, state, county, municipal, and tribal transportation projects initiated by or developed in cooperation with the Indian tribal government. The only entity that can change the TTIP is the tribal government;

(b) The tribal government develops the tribal control schedule from the tribal priority list or TTIP. The tribal control schedule is an accounting and project management tool which contains detailed project and tasks information for all projects identified in the TTIP;

(c) Project information from the tribal control schedule is then included in the BIA's region-wide control schedule without change, unless the tribes control schedule exceeds the amount available to the tribe;

(d) Projects identified on the TTIP that are scheduled in the next 3–5 years must be included by the BIA in the IRR

TIP, unless the TTIP is not financially constrained; and

(e) Tribes that do not generate sufficient annual funding under the IRR funding formula to complete a project may submit their tribal priority lists to the BIA. The BIA will develop the region-wide control schedule and IRR TIP after consulting with and taking into account the tribe's priorities. Alternatively, such tribes may either enter a consortium of tribes and delegate authority to the consortium to develop the TTIP and tribal control schedule or may enter into agreement with other tribes to permit completion of the project. In order to get a project on the TIP, tribes may seek flexible financing alternatives available as described in subpart C of this part.

§ 170.418 What is the tribal priority list?

The tribal priority list is a list of transportation projects which the tribe or tribal organization wants funded. The projects may or may not be identified in order of priority. This list is not financially constrained. Unless the tribal government submits a TTIP, the tribal priority list is provided to the BIA by official tribal action.

§ 170.419 What is the IRR TIP annual update?

The IRR TIP annual update is the process by which the IRR TIP is kept current. The BIA regional office annually updates the IRR TIP for each state in its service area to reflect changes in the TTIP.

§ 170.420 How is the IRR TIP updated?

The updating process begins when BIA provides the projected IRR Program funding amounts to each tribe, or an analysis of the existing tribal priority list or TTIP. New transportation planning information or substantial changes to an IRR tribal project may require an IRR TIP update. BIA reviews the programming of proposed projects with the tribes. Agreed upon adjustments are made to the IRR TIP following the IRR TIP process defined in this part on an annual basis or as otherwise needed.

§ 170.421 Should the IRR TIP be coordinated within the STIP time frames?

Yes, the time frame for the annual update of the IRR TIPS for each state in a BIA regional office's service area should be coordinated with the state transportation agencies. This will ensure that approved IRR TIP updates are included with the STIPs when they are printed and distributed.

§ 170.422 When may the Secretary amend the IRR TIP?

The Secretary may amend the IRR TIP:

(a) At the request of a tribe at any time, the Secretary amend the IRR TIP to add or delete projects or reflect significant changes in scope to a project in a process similar to an IRR TIP update; and

(b) Before reducing the funding for, or rescheduling a project on the IRR TIP, by consulting with the affected tribe and obtaining its consent whenever practicable. The Secretary may not reduce funding for or reschedule a project which is the subject of a negotiated agreement except under the terms of the agreement.

§ 170.423 How is the IRR TIP amended?

The IRR TIP is amended using the same process as updating the IRR TIP.

§ 170.424 Is public involvement required in the development of the IRR TIP?

Yes, public involvement is required in the development of the IRR TIP.

§ 170.425 How does public involvement occur in the development of the IRR TIP?

Public involvement may occur in many ways. For example:

(a) Public involvement entails one or more public meetings. The public is provided the opportunity to comment, either verbally or in writing;

(b) Public involvement activities may be conducted by the state transportation agency or MPO; and

(c) Public notice requires publishing a notice in the local and tribal newspapers when the draft tribal or IRR TIP is complete. The notice must indicate where a copy can be obtained, contact person for questions, where comments may be submitted, and the deadline for submitting comments.

§ 170.426 What happens after the IRR TIP is approved?

The IRR TIP is approved by the Secretary and the Secretary of Transportation and is returned to the BIA. Copies are provided to the BIA DOT, BIA regional offices, FHWA division office, and Indian tribal governments. The FHWA division office transmits the approved IRR TIP to the state transportation agency for inclusion in the STIP.

Within 10 working days of receipt of the approved IRR TIP and IRR funds, the BIA enters the projects into the Federal finance system. Expenditure of funds for development of the projects may then begin even though the state transportation agency may not have yet added the approved IRR TIP to the STIP.

§ 170.427 What is a long-range transportation plan?

An IRR long-range transportation plan is a document setting out a tribe's long-range transportation priorities and needs.

§ 170.428 What may a long-range transportation plan include?

The comprehensive long-range transportation plan may include:

(a) An evaluation of a full range of modal and connections between transportation modes such as highway, rail, air, and water to effectively and economically meet short- and long-term transportation needs;

(b) Trip generation studies including determination of traffic generators due to land use;

(c) Social and economic development planning to identify transportation improvements or needs to accommodate existing and proposed land use in a safe and economical fashion;

(d) Measures that address health and safety concerns;

(e) A review of the existing and proposed transportation system to identify the relationships between the transportation system and the environment;

(f) Cultural preservation planning to identify those issues of importance to the tribe and develop a plan within transportation planning which is sensitive to tribal cultural preservation;

(g) Scenic byways and tourism plans;

(h) Measures that address energy conservation considerations;

(i) A prioritized list of short-term transportation needs; and

(j) An analysis of funding alternatives to implement plan recommendations.

§ 170.429 What is the purpose of long-range transportation planning?

The purpose of long-range transportation planning is to fulfill tribal goals by developing strategies to meet identified transportation needs.

These strategies should address future land use, economic development, traffic demand, public safety, and health and social needs.

(a) The time horizon for long-range transportation planning should be 20 years to match state transportation planning horizons.

(b) Tribes should develop long-range transportation plans to demonstrate their transportation needs.

(c) A tribe may develop a transportation plan under the ISDEAA or, if a tribe chooses, BIA may develop it on the tribe's behalf.

§ 170.430 How does BIA or a tribe involve the public in developing the IRR long-range transportation plan?

BIA or the tribe must solicit public involvement. Tribes may do so in accordance with their own tribal laws and policies. If there are no tribal policies, tribes must use the procedures in this section. Public involvement begins at the same time long-range transportation planning begins and covers the range of users, from private citizens to major public and private entities. Public involvement may be handled in either of the following two ways:

(a) *Public Meetings*: BIA or the tribe must:

(1) Advertise each public meeting in local public newspapers at least 15 days before the meeting date;

(2) Provide at the meeting copies of the draft long-range transportation plan;

(3) Information is provided on funding and the planning process; and

(4) Provide the public the opportunity to comment, either orally or in writing.

(b) *Public Notice*: BIA or the tribe must:

(1) Publish a notice in the local and tribal newspapers when the draft long-range transportation plan is complete;

(2) State in the notice that the long-range transportation plan is available for review, where a copy can be obtained, whom to contact for questions, where comments may be submitted, and the deadline for submitting comments (normally 30 days).

§ 170.431 How is the IRR long-range plan developed and approved?

A. The IRR long-range plan is developed and approved in one of three ways:

(1) By a tribe working through a self-determination contract or self-governance agreement or other funding sources;

(2) By a qualified consultant who is a subcontractor for a tribe that has a self-determination contract or self-governance agreement; or

(3) By BIA upon request of, and in consultation with, a tribe. The tribe and BIA need to agree on the methodology and elements included in development of the IRR long-range transportation plan along with time frames before work begins.

B. During the development of the IRR long-range transportation plan, it is recommended that a midpoint review be conducted jointly by the tribe and BIA. The public reviews a draft IRR long-range transportation plan as part of the public involvement process consistent with § 170.430 of this part. The plan is further refined to address any issues

identified during the public review process.

C. The IRR long-range transportation plan is approved by the tribe(s).

§ 170.432 How is the tribal long-range transportation plan used and updated?

The tribal government uses its IRR long-range transportation plan in its development of a tribal priority list or TTIP. To be consistent with State and MPO planning practices, the IRR long-range transportation plan should be reviewed annually by the tribe, or BIA for direct service tribes, and updated every 5 years, unless conditions dictate otherwise.

§ 170.433 When does BIA update the IRR TIP?

(a) The BIA regional office annually updates the IRR TIP for each State in its service area to reflect changes in the TTIP.

(b) BIA regional offices should coordinate the annual update with each affected state transportation agency. This will ensure that approved IRR TIP updates are included with the STIPs.

§ 170.434 When may the Secretary amend the IRR TIP?

(a) The Secretary may amend the IRR TIP:

(1) At any time if requested by the tribe, in order to add or delete projects or reflect significant changes in scope; and

(2) Before reducing the funding for, or rescheduling a project on the IRR TIP, by consulting with the affected tribe and obtaining its consent whenever practicable.

(b) The Secretary may not reduce funding for or reschedule a project which is the subject of a negotiated agreement except under the terms of the agreement. The IRR TIP is amended using the same public involvement process as updating the IRR TIP.

§ 170.435 How does BIA or a tribe solicit public participation during the development of the IRR TIP?

Public involvement is required in the development of the IRR TIP.

(a) BIA or the tribe may publish a notice in the local and tribal newspapers when the draft tribal or IRR TIP is complete. The notice must indicate where a copy can be obtained, who to contact for answers to questions, where comments may be submitted, and the deadline for submitting comments;

(b) BIA or the tribe may conduct one or more public meetings at which it solicits comments, either orally or in writing; or,

(c) BIA, the tribe, the State, or the metropolitan planning office may conduct other involvement activities.

§ 170.436 What happens after the IRR TIP is approved?

(a) After the Secretaries approve the IRR TIP they will return it to BIA.

(b) BIA will provide copies to BIADOT, BIA regional offices, FHWA division office, and Indian tribal governments.

(c) The FHWA division office transmits the approved IRR TIP to the State transportation agency for inclusion in the STIP.

(d) Within 10 working days of receipt of the approved IRR TIP and IRR funds, BIA enters the projects into the Federal finance system. Expenditure of funds for development of the projects may then begin even though the State transportation agency may not have yet added the approved IRR TIP to the STIP.

Public Hearings**§ 170.437 What are the purposes and objectives of public hearings for the IRR TIP, long range transportation plan, and IRR projects?**

The purposes and objectives of these public hearings are to:

(a) Inform the public and obtain public input;

(b) Ensure that locations, designs or specifications are consistent with tribal objectives and with applicable Federal law; and

(c) Promote coordination and comprehensive planning of IRR activities.

§ 170.438 When is a public hearing for IRR TIP, long-range transportation plan or project held?

BIA or the tribe must hold a public hearing if a plan or project:

(a) Is a new route;

(b) Would significantly change the layout or function of connecting or related roads or streets;

(c) Would cause a substantial adverse effect on adjacent real property;

(d) Is controversial or expected to be controversial in nature; or

(e) Is for obtaining input during the TIP and long-range transportation planning processes.

§ 170.439 How are public hearings for IRR planning and projects funded?

Public hearings for IRR planning and projects are funded as follows:

(a) Public hearings for IRR planning:

(1) Public hearings for TIPS and long-range transportation plans conducted by tribes are funded using the 2 percent IRR transportation planning or IRR construction funds; and

(2) Public hearings for the IRR TIP and long-range transportation plans conducted by BIA are funded using IRR construction funds.

(b) Public hearings for IRR projects conducted by either tribes or BIA are funded using IRR construction funds.

§ 170.440 How does BIA or the tribe determine the need for a public hearing?

The tribe, or BIA, after consultation with the appropriate tribe and other involved agencies, determines whether or not a public hearing is needed for an IRR TIP, long-range transportation plan or project. The determination based on the criteria in § 170.434.

§ 170.441 How is the public informed when no public hearing is scheduled?

When no public hearing for an IRR project is scheduled, either the tribe or BIA must do the following:

(a) Give adequate notice to the public before project activities are scheduled to begin;

(b) Include in the notice the project name and location, the type of improvement planned, the date the activity is scheduled to start, and the name and address where more information is available, and provisions for requesting a hearing; and

(c) Send a copy of the notice to the affected tribe(s).

§ 170.442 How must BIA or a tribe inform the public when a hearing is held?

When BIA or a tribe holds a hearing under this part, it must notify the public of the hearing by publishing a notice.

(a) The public hearing notice is a document containing:

(1) Date, time, and place of the hearing;

(2) Planning activities or project location;

(3) Proposed work to be done, activities to be conducted, etc.;

(4) Where preliminary plans, designs or specifications may be reviewed; and

(5) How and where to get more information.

(b) BIA or the tribe must publish the notice:

(1) By posting and/or publishing the notice at least 30 days before the public hearing. A second notice for a hearing is optional; and,

(2) By sending it to the affected tribe(s).

§ 170.443 How is a public hearing conducted?

(a) *Who conducts the hearing.* A tribal or Federal official is appointed to preside at the public hearing. The official presiding over the hearing must maintain a free and open discussion of the issues.

(b) *Record of hearing.* The presiding official is responsible for compiling the official record of the hearing. A record of a hearing is a summary of oral

testimony and all written statements submitted at the hearing. Additional written comments made or provided at the hearing, or within 5 working days of the hearing, will be made a part of the record.

(c) *Hearing process.* (1) The presiding official(s) explains the purpose of the hearing and provides an agenda;

(2) The presiding official(s) solicits public comments from the audience on the merits of IRR projects and activities; and

(3) The presiding official(s) will inform the hearing audience of the appropriate procedures for a proposed IRR project or activity, including but not limited to:

(i) Right(s)-of-way acquisition;

(ii) Relocation of utilities and relocation services;

(iii) Authorized payments allowed by the Uniform Relocation and Real Property Acquisition Policies Act, 42 U.S.C. 4601 *et seq.* as amended;

(iv) Draft transportation plan; and

(v) Explain the scope of the project and its impact on traffic during and after construction.

(d) *Availability of information.*

Appropriate maps, plats, project plans and/or specifications will be available at the hearing for public review.

Appropriate officials are present to answer questions.

(e) *Opportunity for comment.*

Comments are received as follows:

(1) Oral statement at the hearing;

(2) Written statement submitted at the hearing;

(3) Written statement sent to the address noted in the hearing notice within 5 working days following the public hearing.

§ 170.444 How are the results of a public hearing obtained?

Results of a public hearing are available as follows:

(a) Within 20 working days of the completion of the public hearing, the presiding official(s) issues a hearing statement summarizing the results of the public hearing and the determination of further needed action.

(b) The presiding official(s) posts the hearing statement at the hearing site. The public may request a copy. The hearing statement outlines appeal procedures.

§ 170.445 Can a decision be appealed?

Yes, a decision from the public hearing may be appealed through the appropriate appeal processes as follows:

(a) *Federal decisions:* For BIA decisions, 25 CFR part 2 applies. For FHWA decisions, 23 CFR part 1420 applies.

(b) *Tribal decisions*: The appropriate tribal dispute resolution process applies.

IRR Inventory

§ 170.446 What is the IRR inventory?

The IRR inventory is a comprehensive list of information for all transportation facilities eligible for IRR funding by tribe or reservation, by BIA agency and region, Congressional district, State, and county. Other specific information collected and maintained under the IRR Program includes classification, route number, bridge number, current and future traffic volumes, maintenance responsibility, ownership, and other information as required in subpart C.

§ 170.447 How is the IRR inventory used?

BIA or tribes can use the IRR inventory data for a variety of purposes, such as assisting in the transportation planning process, justifying expenditures, identifying transportation needs, maintaining existing facilities, developing management systems, and project planning and design.

§ 170.448 How is the IRR inventory database amended?

Either BIA or a tribe may initiate the process for updating the IRR inventory. The Secretary must update the IRR inventory to include the transportation facility as long as it is an eligible IRR facility.

§ 170.449 How are transportation facilities added to or deleted from the IRR inventory?

A tribal government or its designated body can propose changes to the IRR inventory by submitting a tribal resolution or similar official authorization to the appropriate BIA regional office. That office approves the submission if it is accurate and the facility is eligible as an IRR facility.

§ 170.450 What facilities can be included in the IRR inventory?

The minimum requirements for including proposed transportation facilities in the IRR inventory are:

(a) A tribal resolution or other official tribal authorization must be obtained in support of the proposed transportation facility;

(b) Proposed facilities must address documented transportation needs of tribes as demonstrated by tribal transportation planning efforts, such as identification in the long-range transportation plan;

(c) The proposed facility must be eligible for IRR funding; and

(d) The proposed facility, when constructed, must be open to the public.

§ 170.451 How accurate must the IRR road inventory database be?

The information contained in the inventory database must be to the following accuracy:

(a) The roadway width must be within 1 foot (.3048 meters) of actual width; and

(b) The length of roadway must be within 100 feet (30.48 meters) of actual length.

§ 170.452 What are the standards for IRR atlas maps?

IRR atlas maps must:

(a) Be drawn to an appropriate scale;

(b) Show adequate topography, all IRR roads, contours as appropriate, title block, and legend;

(c) Show State, county, tribal, congressional, and private land boundaries as appropriate; and

(d) Be capable of displaying a variety of coordinate systems to minimize the number of (C-size paper) maps for a given reservation.

§ 170.453 What is a strip map?

For purposes of this subpart, a strip map is a graphical image that reflects a section of road or other transportation facility being added to or modified in the IRR inventory. It also defines its location with respect to the various state, county, tribal, and congressional boundaries. These maps further define overall dimensions of a section of road or facility and the accompanying inventory data.

§ 170.454 How are strip maps used?

Strip maps are used for the following purposes:

(a) Maintaining a visual inventory of each transportation facility in the IRR inventory;

(b) Transportation planning;

(c) Project planning; and

(d) IRR management systems.

§ 170.455 What standards must IRR inventory strip maps meet?

Strip maps must be consistent with the requirements of atlas maps except that a table is also displayed that provides specific inventory information about a section of an IRR route or other transportation facility on the strip map. This information is taken from the IRR inventory.

§ 170.456 What is functional classification?

For purposes of this subpart, functional classification means an analysis of a specific transportation facility taking into account current and future traffic generators, and their relationship to connecting or adjacent BIA, state, county, Federal, and/or local

roads and other intermodal facilities. Functional classifications are used to delineate the difference between the various road and/or intermodal facilities standards eligible for funding under the IRR Program.

§ 170.457 What are the functional classifications of the IRR Program?

The functional classifications of the IRR Program are given in the following list:

(a) *Class 1*: Major arterial roads providing an integrated network with characteristics for serving traffic between large population centers, generally without stub connections and having average daily traffic volumes of 10,000 vehicles per day or more with more than two lanes of traffic.

(b) *Class 2*: Major or minor arterial roads providing an integrated network having the characteristics for serving traffic between large population centers, generally without stub connections. May also link smaller towns and communities to major resort areas which attract travel over long distances and generally provide for relatively high overall travel speeds with minimum interference to through traffic movement. Generally provide for at least inter-county or inter-State service and are spaced at intervals consistent with population density. This class of road will have less than 10,000 vehicles per day.

(c) *Class 3*: Streets-roads which are located within communities serving residential and other urban type settings.

(d) *Class 4*: Section line and/or stub type roads which collect traffic for arterial type roads, make connections within the grid of the IRR system. This class of road may serve areas around villages, into farming areas, to schools, tourist attractions, or various small enterprises. Also included are roads and motorized trails for administration of forest, grazing mining, oil, recreation, or other utilization purposes. This classification encompasses all those public roads not falling into either the Class 2 or 3 definitions above.

(e) *Class 5*: This classification encompasses all non-road type paths, trails, walkways, or other designated types of routes for public use by foot traffic, bicycles, trail bikes, or other uses to provide for general access of non-motorized traffic.

(f) *Class 6*: This classification encompasses other modes of transportation such as public parking facilities adjacent to IRR routes and scenic byways, rest areas, and other scenic pullouts, ferry boat terminals, and transit terminals.

(g) *Class 7*: This classification encompasses air strips which are within the boundaries of the IRR system grid and are open to the public. These air strips are included for inventory and maintenance purposes only.

§ 170.458 How are functional classifications used in the IRR Program?

Functional classifications are used to delineate the difference between the various road and/or intermodal facilities standards eligible for funding under the IRR Program.

§ 170.459 How is the surface type determined for an IRR road project?

The surface type of a road is based on input from the tribe and engineering judgment, taking into account projected traffic volumes, terrain, location, functional classification, and use of the road.

§ 170.460 What is a proposed IRR transportation facility?

A proposed IRR transportation facility is any transportation facility, including bridges, identified to serve public transportation needs that is eligible for construction or improvement under the IRR Program.

Environment and Archeology

§ 170.461 What are the archeological and environmental requirements for the IRR Program?

(a) The archeological and environmental requirements for tribes that enter into self-determination contracts or self-governance agreements for the IRR Program are in 25 CFR 900.125 and 1000.243.

(b) The archeological and environmental requirements with which BIA must comply on the IRR Program are contained in Appendix A to this subpart.

§ 170.462 Can IRR funds be used for required archeological and environmental compliance work?

Yes, for approved IRR projects, IRR funds can be used for environmental and archeological work consistent with 25 CFR 900.125(c)(6) and (c)(8) and 25 CFR 1000.243(b) and applicable tribal laws for:

- (a) Road and/or bridge rights-of-way;
- (b) Borrow pits and/or aggregate pits associated with IRR activities staging areas;
- (c) Limited mitigation outside of the construction limits as necessary to address the direct impacts of the construction activity as determined in the environmental analysis and after consultation with the affected tribe(s) and the appropriate Secretary(s); and
- (d) Construction easements.

Design

§ 170.464 What design standards are used in the IRR Program?

Appendix B to this subpart is a listing of design standards that BIA may use for the IRR program. Tribes may propose road and bridge design standards to be used in the IRR Program which are consistent with or exceed applicable Federal standards. The standards may be negotiated between BIA and the tribe and included in a self-determination contract or self-governance agreement.

§ 170.465 May BIA use FHWA-approved State or tribal design standards?

Yes, BIA may use FHWA-approved State or tribal design standards?

§ 170.466 How are these standards used in the design of IRR projects?

The standards in this section must be applied to each construction project consistent with a minimum 20 year design life. The design of IRR projects must take into consideration:

- (a) The existing and planned future usage of the IRR facility in a manner that is conducive to safety, durability, and economy of maintenance;
- (b) The particular needs of each locality, and the environmental, scenic, historic, aesthetic, community, and other cultural values and mobility needs in a cost-effective manner; and
- (c) Access and accommodation for other modes of transportation.

§ 170.467 When can a tribe request an exception from the design standards?

A tribe can request an exception from the design standards in Appendix B of this subpart under the conditions in this section. FHWA reviews and may approve all design exceptions for IRR projects unless otherwise delegated under an IRR stewardship plan or agreement. To request an exception from the standards, the engineer of record must submit written documentation with appropriate supporting data, sketches, details, and justification based on engineering analysis.

- (a) FHWA may, in accordance with applicable law, grant exceptions for:
 - (1) Experimental features on projects; and
 - (2) Projects where conditions warrant that exceptions be made.
- (b) FHWA can approve a project design that does not conform to the minimum criteria only after due consideration is given to all project conditions, such as:
 - (1) Maximum service and safety benefits for the dollar invested;
 - (2) Compatibility with adjacent features; and

(3) The probable time before reconstruction of the project due to increased transportation demands or changed conditions.

§ 170.468 If BIA or FHWA denies a design exception, can that decision be appealed?

Yes, if BIA denies a design exception request made by a tribe, the decision may be appealed to FHWA. If FHWA denies a design exception, the decision may be appealed to the next higher level of review within the Department of Transportation.

§ 170.469 How long does BIA or FHWA have to approve or decline a design exception request by a tribe?

BIA or FHWA has 30 days from receipt of the request to approve or decline the exception.

Construction and Construction Monitoring and Rights-of-Way

§ 170.472 What road and bridge construction standards are used in the IRR Program?

Appendix B to this subpart lists design standards that may be used in the IRR Program. Tribes may propose road and bridge construction standards to be used in the IRR Program which are consistent with or exceed applicable federal standards as may be negotiated between BIA and the tribe and included in a self-determination contract or self-governance agreement.

§ 170.473 What standards must be used for intermodal projects?

For designing and building eligible intermodal projects funded by the IRR Program, tribes must use either:

- (a) Nationally recognized standards for comparable projects; or
- (b) Tribally adopted standards that meet or exceed nationally recognized standards for comparable projects.

§ 170.474 May BIA use FHWA-approved State or tribal road and bridge construction standards?

Yes, BIA may use FHWA-approved, State or tribal road and bridge construction standards.

§ 170.475 How will BIA monitor the IRR project during construction?

When a tribe or tribal organization carries out the IRR project under Pub. L. 93-638, BIA will monitor performance under the requirements of 25 CFR 900.130 and 900.131(b)(9) or 25 CFR 1000.243 and 1000.249(c) and (e), as appropriate. If the Secretary discovers a problem during an on-site monitoring visit, the Secretary must promptly notify the tribe and, upon request by the tribe, provide technical assistance.

§ 170.476 Is tribal consultation required in order to change a construction project?

Yes, substantial changes to the construction project must be processed in consultation with the affected tribe, where feasible.

§ 170.477 Who conducts inspections of IRR construction projects under a self-determination contract or self-governance agreement?

The Secretary or tribal government, as provided for under the contract or

agreement, is responsible for the day-to-day project inspections except for monitoring by the Secretary as provided in § 170.475.

§ 170.478 What is quality control and who performs it?

Quality control is all activity conducted to ensure that all construction requirements are fulfilled. The tribe, other contractors, and/or BIA may perform quality control.

§ 170.479 What IRR construction records must tribes and BIA keep?

The following table shows which IRR construction records BIA and tribes must keep and the requirements for access.

Record keeper	Records that must be kept	Access
(a) Tribe or tribal organization.	All records required by the ISDEAA and 25 CFR 900.130–900.131 or 25 CFR 1000.243 and 1000.249, as appropriate.	BIA is allowed access to tribal IRR construction records as required under 25 CFR 900.130, 900.131 or 25 CFR 1000.243 and 1000.249, as appropriate.
(b) BIA	Completed daily reports of construction activities appropriate to the type of construction it is performing.	Upon reasonable advance request by a Tribe, BIA must provide reasonable access to records.

§ 170.480 Can a tribe review and approve Plans, Specification and Estimate (PS&E) packages for IRR projects?

Yes, a tribe can review and approve PS&E packages for IRR projects if the tribe meets the requirements of a state as defined in 23 U.S.C. 302(a) and enters into a tribal IRR Program stewardship agreement with the Secretary of Transportation or designee.

§ 170.481 Who must approve all PS&E packages?

All PS&E packages must be signed and/or sealed by the appropriate licensed professional engineer and by the appropriate official as follows:

(a) Absent an approved IRR Program stewardship agreement, FHWA approves all PS&E packages submitted by BIA;

(b) When an approved BIA regional IRR Program stewardship agreement exists, PS&E packages are approved by an official in the BIA regional office;

(c) When a tribe has assumed the responsibility to approve PS&E packages for tribal, state, and locally owned IRR facilities through a tribal IRR Program stewardship agreement, the tribe approves PS&E packages with the

consent of the facility owner after a health and safety review by the Secretary;

(d) When a tribe has not assumed the responsibility to approve PS&E packages under paragraph (c) of this section, BIA or FHWA approves PS&E packages under paragraph (a) or (b) of this section, as applicable.

§ 170.482 How can the plans, specifications, and estimates of an IRR project be changed during construction?

Only the licensed engineer may change an IRR project's plans, specifications, and estimates (PS&E) during construction.

(a) For substantial changes the original approving agency must review the change. The approving agency is the Federal, tribal, State, or local entity with PS&E approval authority over the project.

(b) In making any substantial change, the approving agency must consult with the affected tribe and the entity having maintenance responsibility over the facility.

(c) No change may be made that exceeds the limits of available funding

without the consent of the funding agency.

§ 170.483 What is the final inspection procedure for an IRR construction project?

At the conclusion of a construction project, the agency or organization responsible for the project must make a final inspection. The purpose of the inspection is to determine that the project has been completed in reasonable conformity with the PS&E.

(a) Appropriate officials from the tribe, BIA, and FHWA are encouraged to participate in the inspection.

(b) BIA, FHWA, contractors, and maintenance personnel should also participate in the inspection.

§ 170.484 How is construction project closeout conducted?

An IRR construction project closeout is the final accounting of all IRR construction project expenditures. It is the closing of the financial books of the Federal Government for that construction project and is conducted after the final inspection. The following table contains the requirements for preparing the report.

If the project was completed by . . .	Then . . .	And the closeout report must . . .
(a) BIA	The regional engineer or designee is responsible for closing out the project and preparing the report.	(1) Summarize the construction project records to ensure compliance requirements have been met; and (2) Review the bid item quantities and expenditures to ensure reasonable conformance with the PS&E and modifications.
(b) A tribe	Agreements negotiated under Pub. L. 93–638 specify who is responsible for closeout and preparing the report.	(1) Meet the requirements of Pub. L. 93–638; and (2) Comply with 25 CFR 900.130(d) and 131(b)(10) and 25 CFR 1000.249, as applicable.

§ 170.485 Who has final acceptance of the IRR project audit?

The Secretary has final acceptance and approval of the project including the IRR project audit.

§ 170.486 When does a project closeout occur?

A project closeout occurs after the final project inspection is concluded and the IRR project is accepted by the facility owner and the Secretary.

§ 170.487 Who must conduct the project closeout and develop the report?

(a) The self-determination contract or self-governance agreement must specify who is responsible for project closeout and development of a final report.

(b) The Secretary is responsible for closing out the project and preparing the report when the project is conducted by the Secretary.

§ 170.488 What information must be made available for the project closeout?

(a) When the Secretary conducts the project, all project information must be made accessible for the IRR construction project closeout. Such information may include, but is not limited to: Daily diaries, weekly progress reports, subcontracts, subcontract expenditures, salaries, equipment expenditures, etc.

(b) When a tribe conducts the project under a self-determination contract or self-governance agreement, all project information must be made accessible for the IRR construction project closeout. Such information may include but is not limited to: Daily diaries, weekly progress reports, subcontracts, subcontract expenditures, salaries, equipment expenditures, etc.

§ 170.489 Who is provided a copy of the IRR construction project closeout report?

(a) When the Secretary conducts the project, copies of the IRR construction project closeout reports are provided to the affected tribes and the Secretary of Transportation.

(b) When a tribe conducts the project under a self-determination contract or self-governance agreement, the contract or agreement must specify who will be provided a copy of the closeout report.

§ 170.490 Will projects negotiated under Public Law 93-638 specify who will be provided a copy of the closeout report?

Yes, projects negotiated under Public Law 93-638 must specify who will be provided a copy of the closeout report.

§ 170.491 Who prepares the IRR construction project closeout report?

The IRR construction project closeout report is prepared by whomever administers the project or FHWA or BIA

within 120 calendar days of project completion.

§ 170.500 What provisions apply to acquiring IRR Program rights-of-way over trust or restricted lands?

Rights-of-way across trust or restricted lands are covered by 25 CFR part 169 except where Federal statutory authority exists for tribes to grant rights-of-way across their reservations without approval by the Secretary.

§ 170.501 What must a right-of-way easement document contain at a minimum?

(a) For rights-of-way across Indian trust and restricted lands, those documents required by 25 CFR part 169 must be submitted; and

(b) For lands other than trust or restricted, the following information must be submitted:

- (1) Identification of the grantor and grantee;
- (2) A legal description of the property acquired for the right-of-way;
- (3) A right-of-way plat/map of definite location;
- (4) A statement of the term of the right-of-way, whether for a specific term of years, whether it includes a right of renewal, or whether the grant is in perpetuity;

(5) Terms and conditions on the grant of the right-of-way, including but not limited to, other permissible uses of the right-of-way, or specific restrictions on the rights-of-way easements;

(6) Identification of whether the rights-of-way includes the right to construct, and/or re-construct the facility; and

(7) A statement on whether the right-of-way may be transferred or assigned and the terms and conditions under which a transfer or assignment may occur.

(c) If a rights-of-way document covers maintenance it may include an identification of maintenance responsibilities assumed by the grantee or retained by the grantor and whether such rights convey with any transfer of the rights-of-way.

§ 170.502 How are rights-of-way granted on Indian trust or restricted fee lands?

Grants of right-of-way must be made under the provisions of 25 CFR part 169.

Program Reviews and Management Systems**§ 170.510 What are BIA IRR Program reviews?**

On an annual basis, BIADOT and FHWA initiate and conduct informal program reviews to examine program procedures and identify improvements. These reviews evaluate the procedures

being used by BIA and FHWA to administer, implement, and monitor the IRR Program. These program reviews may be held in conjunction with either a national BIA transportation meeting or an IRR Program Coordinating Committee meeting. BIA must provide notice to tribes of these informal program reviews. Tribes may send representatives to these meetings at their own expense.

§ 170.511 What is an IRR process review of a BIA regional office?

(a) The IRR process review of a BIA regional office is a review involving FHWA, BIA, and affected Tribe(s) in the region, of a BIA regional office's processes and controls in the following areas:

- (1) Transportation;
- (2) Planning;
- (3) Design;
- (4) Contract administration;
- (5) Construction;
- (6) Financial management; and
- (7) Systems maintenance and existing stewardship agreements.

(b) The review may result in recommendations to improve transportation planning, design, contract administration, construction, financial management, and systems management activities performed by a BIA regional office.

§ 170.512 What happens with the information gathered from the IRR process review?

After the IRR process review, the review team must:

(a) Conduct an exit interview during which it makes a brief oral report of findings and recommendations to BIA regional director and IRR regional staff.

(b) Prepare a written report of its findings and recommendations which it combines the gathered information into a short written report. The final report is provided to the reviewed office, BIA, all participants, affected tribal governments and/or organizations.

§ 170.513 What happens when the review process identifies areas for improvement?

When the review process identifies areas for improvement:

(a) The regional office must develop a corrective action plan;

(b) BIADOT and FHWA review and approve the plan;

(c) FHWA may provide technical assistance during the development and implementation of the plan; and

(d) The reviewed BIA regional office provides either annual or biannual corrective action implementation reports to BIADOT and FHWA and implementation of the plan. The reviewed BIA regional office provides

either annual or biannual corrective action implementation reports to BIA DOT and FHWA.

§ 170.514 Are management systems required for the IRR Program?

(a) To the extent appropriate, the Secretaries must, in consultation with tribes, develop and maintain the following management systems for the IRR Program:

- (1) Pavement management;
- (2) Safety management;
- (3) Bridge management; and
- (4) Congestion management.

(b) Other management systems may include the following:

- (1) Public transportation facilities;
- (2) Public transportation equipment; and/or
- (3) Intermodal transportation facilities and systems.

(c) All management systems for the IRR Program must be consistent with applicable Federal regulations to be developed by the Secretaries in consultation with tribes.

(d) A tribe may enter into an ISDEAA contract or agreement to develop, implement, and maintain alternative tribal management systems, provided that such systems are consistent with Federal management systems.

§ 170.515 How are IRR Program management systems funded?

BIA funds IRR Program management systems to develop the nationwide IRR Program management systems. If a tribe elects not to use the nationwide system, it may develop a tribal management system using the 2 percent IRR tribal transportation planning or IRR construction funds.

§ 170.516 How will the IRR management systems be implemented?

BIA Division of Transportation (BIA DOT) implements and maintains nationwide IRR management systems using IRR Program management funds. For direct service tribes that chose not to contract, BIA regional offices will provide the database information for these nationwide systems using IRR construction funds. A tribe may collect and must provide this information to the BIA regional office using IRR construction funds or 2 percent IRR tribal transportation planning funds under a self-determination contract or self-governance annual funding agreement.

Appendix A to Subpart D

Archeological and Environmental Requirements for the IRR Program

All BIA work for the IRR Program must comply with the following archeological and environmental requirements:

1. 16 U.S.C. 1531 Endangered Species Act.
2. 16 U.S.C. 460L Land and Water Conservation Fund Act (Section 6(f)).
3. 16 U.S.C. 661–667d Fish and Wildlife Coordination Act.
4. 23 U.S.C. 138 Preservation of Parklands.
5. 25 U.S.C. 3001–3013 Native American Graves Protection and Repatriation Act.
6. 33 U.S.C. 1251 Federal Water Pollution Control Act and Clean Water Act.
7. 42 U.S.C. 7401 Clean Air Act.
8. 42 U.S.C. 4321 National Environmental Policy Act.
9. 49 U.S.C. 303 Preservation of Parklands.
10. 7 U.S.C. 4201 Farmland Protection Policy Act.
11. 7 CFR 355 Endangered Species Act regulations.
12. 7 CFR 658 Farmland Protection Policy Act regulations.
13. 23 CFR 770 Air Quality Conformity and Priority Procedures for use in Federal-aid Highway and Federally-Funded Transit Programs.
14. 23 CFR 771 Environmental Impact and Related Procedures.
15. 23 CFR 772 Procedures for Abatement of Highway Traffic Noises and Construction Noises.
16. 23 CFR 777 Mitigation of Environmental Impacts To Privately Owned Wetlands.
17. 36 CFR 800 Historic Preservation.
18. 40 CFR 260–271 Resource Conservation and Recovery Act.
19. 40 CFR 300 Comprehensive Environmental Response, Compensation, and Liability Act.
20. Applicable tribal/State laws.
21. Other applicable Federal laws.

Appendix B to Subpart D

Design Standards for the IRR Program

Depending on the nature of the project, tribes may use the following design standards. Additional standards may also apply. To the extent that any provisions of these standards are inconsistent with the ISDEAA, these provisions do not apply.

1. AASHTO Policy on Geometric Design of Highways and Streets.
2. FHWA Federal Lands Highway, Project Development and Design Manual.
3. Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, latest edition.
4. 23 CFR 645 Utilities.
5. 23 CFR 646 Railroads.
6. MUTCD Manual of Uniform Traffic Safety Devices, latest edition.
7. AASHTO A Guide for Transportation Landscape and Environmental Design.
8. AASHTO Roadside Design Guide, latest edition.
9. AASHTO Guide for Selecting, Locating and Designing Traffic Barriers, latest edition.
10. AASHTO Standard Specifications for Highway Bridges, latest edition.
11. FHWA Flexibility in Highway Design.
12. FHWA Roadside Improvements for Local Road and Streets.
14. FHWA Improving Guardrail Installations and Local Roads and Streets.
15. 23 U.S.C. 106 PS&E.
16. 23 U.S.C. 109 Standards.

17. 23 CFR 625 Design Standards for Highways.

18. 23 CFR 630 Preconstruction Procedures.

19. 23 CFR 633 Required Contract Provisions.

20. 23 CFR 635 Construction and Maintenance.

21. DOT Metric Conversion Plan, October 31, 1991.

Subpart E—Service Delivery for Indian Reservation Roads

§ 170.600 What IRR Program functions may be assumed by a tribe in a self-determination contract or self-governance agreement?

All IRR functions and activities that are otherwise contractible may be included in a self-determination contract or self-governance agreement. (23 U.S.C. 202(d)(3)(B)).

§ 170.601 What IRR project and program functions are not otherwise contractible?

The following IRR functions or activities are non-contractible:

(a) IRR project-related pre-contracting activities:

(1) Notifying tribes of available funding including the right of first refusal; and

(2) Providing technical assistance.

(b) IRR project-related contracting activities:

(1) Providing technical assistance;

(2) Reviewing all scopes of work (25 CFR 900.122);

(3) Evaluating proposals and making declination decisions, if warranted;

(4) Performing declination activities;

(5) Negotiating and entering into contracts or agreements with state, tribal, and local governments and other Federal agencies;

(6) Processing progress payments or contract payments;

(7) Approving contract modifications;

(8) Processing claims and disputes with tribal governments; and

(9) Closing out contracts or agreements.

(c) Planning activities:

(1) Reviewing IRR transportation improvement programs developed by tribes or other contractors;

(2) Reviewing IRR long-range transportation plans developed by tribes or other contractors; and

(3) Performing other Federal responsibilities identified in the IRR Transportation Planning Procedures and Guidelines manual.

(d) Environmental and historical preservation activities:

(1) Reviewing and approving all items required for environmental compliance; and

(2) Reviewing and approving all items required for archaeological compliance.

- (e) Processing rights-of-way:
 - (1) Reviewing rights-of-way applications and certifications;
 - (2) Approving rights-of-way documents;
 - (3) Processing grants and acquisition of rights-of-way requests for tribal trust and allotted lands under 25 CFR part 169;
 - (4) Responding to information requests;
 - (5) Filing Affidavit of Completion Forms; and
 - (6) Performing custodial functions related to storing right-of-way documents.
- (f) Conducting project development and design under 25 U.S.C. 900.131:
 - (1) Participating in the plan-in-hand reviews as facility owner;
 - (2) Reviewing and/or approving plans, specifications, and cost estimates (PS&E's) for health and safety assurance as facility owner;
 - (3) Reviewing PS&E's to assure compliance with all other Federal laws; and
 - (4) Reviewing PS&E's to assure compliance with or exceeding Federal standards for IRR design and construction.
- (g) Construction:
 - (1) Making application for clean air/clean water permits as facility owner;
 - (2) Ensuring that all required state/tribal/Federal permits are obtained;
 - (3) Performing quality assurance activities;
 - (4) Conducting value engineering activities as facility owner;
 - (5) Negotiating with contractors on behalf of Federal Government;
 - (6) Approving contract modifications/change orders;
 - (7) Conducting periodic site visits;
 - (8) Performing all Federal Government required project-related activities contained in the contract documents and required by 25 CFR parts 900 and 1000;
 - (9) Conducting activities to assure compliance with safety plans as a jurisdictional responsibility (hazardous materials, traffic control, OSHA, etc.);
 - (10) Participating in final inspection and acceptance of project documents (as-built drawings) as facility owner; and
 - (11) Reviewing project closeout activities and reports.
- (h) Other activities:
 - (1) Performing other non-contractible required IRR project activities contained in 25 CFR part 900 and part 1000; and
 - (2) Other Title 23 United States Code non-project-related management activities.
- (i) BIA Division of Transportation program management:
 - (1) Developing budget on needs for the IRR Program;
 - (2) Developing legislative proposals;
 - (3) Coordinating legislative activities;
 - (4) Developing and issuing regulations;
 - (5) Developing and issuing IRR planning, design, and construction standards;
 - (6) Developing/revising interagency agreements;
 - (7) Developing and approving IRR stewardship agreements in conjunction with FHWA;
 - (8) Developing annual IRR obligation and IRR Program accomplishments reports;
 - (9) Developing reports on IRR project expenditures and performance measures for the Government Performance and Results Act (GPRA);
 - (10) Responding to/maintaining data for congressional inquiries;
 - (11) Developing and maintaining funding formula and its database;
 - (12) Allocating IRR Program and other transportation funding;
 - (13) Providing technical assistance to tribe/tribal organizations/agencies/regions;
 - (14) Providing national program leadership for: National Scenic Byways Program, Public Lands Highways Discretionary Program, Transportation Enhancement Program, Tribal Technical Assistance Program, Recreational Travel and Tourism, Transit Program, ERFO Program, Presidential initiatives (Millennium Trails, Lewis & Clark, Western Tourism Policy Group);
 - (15) Participating in and supporting tribal transportation association meetings such as the Intertribal Transportation Association regional and national meetings;
 - (16) Coordinating with and monitor Tribal Technical Assistance Program centers;
 - (17) Planning, coordinating, and conducting BIA/tribal training;
 - (18) Developing information management systems to support consistency in data format, use, etc., with the Secretary of Transportation for the IRR Program;
 - (19) Participating in special transportation related workgroups, special projects, task forces and meetings as requested by tribes;
 - (20) Participating in national transportation organizations, such as the Western Association of State Highway and Transportation Officials, American Association of State Highway and Transportation Officials, National Association of County Engineers, and Transportation Research Board;
 - (21) Participating in and supporting FHWA Coordinated Technology Improvement program;
 - (22) Participating in national and regional IRR Program meetings;
 - (23) Consulting with tribes on non-project related IRR Program issues;
 - (24) Participating in IRR Program, process, and product reviews;
 - (25) Developing and approve national indefinite quantity service contracts;
 - (26) Assisting and supporting the IRR Coordinating Committee;
 - (27) Processing IRR Bridge program projects and other discretionary funding applications or proposals from tribes;
 - (28) Coordinating with FHWA;
 - (29) Performing stewardship of the IRR Program;
 - (30) Performing oversight of the IRR Program and its funded activities; and
 - (31) Performing any other non-contractible IRR Program activity included in this part.
- (j) BIA DOT Planning:
 - (1) Maintaining the official IRR inventory;
 - (2) Reviewing long-range transportation plans;
 - (3) Reviewing and approving IRR transportation improvement programs;
 - (4) Maintaining nationwide inventory of IRR strip and atlas maps;
 - (5) Coordinating with tribal/state/regional/local governments;
 - (6) Developing and issuing procedures for management systems;
 - (7) Distributing approved IRR transportation improvement programs to BIA regions;
 - (8) Coordinating with other Federal agencies as applicable;
 - (9) Coordinating and processing the funding and repair of damaged Indian reservation roads with FHWA;
 - (10) Calculating and distributing IRR transportation planning and Atlas mapping funds to BIA regions;
 - (11) Reprogramming unused IRR transportation planning and Atlas mapping funds at the end of the fiscal year;
 - (12) Monitoring the nationwide obligation of IRR transportation planning and Atlas mapping funds;
 - (13) Providing technical assistance and training to BIA regions and tribes;
 - (14) Approving Atlas maps;
 - (15) Reviewing IRR inventory information for quality assurance; and
 - (16) Advising BIA regions and tribes of transportation funding opportunities.
- (k) BIA DOT engineering:
 - (1) Participating in the development of design/construction standards with FHWA;
 - (2) Developing and approving design/construction/maintenance standards;
 - (3) Conducting IRR Program/product reviews; and
 - (4) Developing and issuing criteria for pavement and congestion management systems.

(l) BIA DOT responsibilities for bridges;

(1) Maintaining BIA National Bridge Inventory information/database;

(2) Conducting quality assurance of the bridge inspection program;

(3) Reviewing and processing IRR Bridge program applications;

(4) Participating in second level review of IRR bridge PS&E; and

(5) Developing criteria for bridge management systems.

(m) BIA DOT responsibilities to perform other non-contractible required IRR Program activities contained in this part;

(n) BIA regional offices program management:

(1) Designating IRR system roads;

(2) Notifying tribes of available funding;

(3) Developing state IRR transportation improvement programs;

(4) Providing FHWA-approved IRR transportation improvement programs to tribes;

(5) Providing technical assistance to tribes/tribal organizations/agencies;

(6) Funding common services as provided as part of the region/agency/ BIA Division of Transportation IRR costs;

(7) Processing and investigating non-project related tort claims;

(8) Preparing budgets for BIA regional and agency IRR Program activities;

(9) Developing/revising interagency agreements;

(10) Developing control schedules/ Transportation Improvement Programs;

(11) Developing regional IRR stewardship agreements;

(12) Developing quarterly/annual IRR obligation and program accomplishments reports;

(13) Developing reports on IRR project expenditures and performance measures for Government Performance and Results Act (GPRA);

(14) Responding to/maintaining data for congressional inquiries;

(15) Participating in Indian transportation association meetings such as Intertribal Transportation Association regional and national meetings;

(16) Participating in Indian Local Technical Assistance Program (LTAP) meetings and workshops;

(17) Participating in BIA/tribal training development (highway safety, work zone safety, etc.);

(18) Participating in special workgroups, task forces, and meetings as requested by tribes (tribal members and BIA region/agency personnel);

(19) Participating in national transportation organizations meetings and workshops;

(20) Reviewing Coordinated Technology Improvement program project proposals;

(21) Consulting with tribal governments on non-project related program issues;

(22) Funding costs for common services as provided as part of BIA IRR region/agency/contracting support costs;

(23) Reviewing and approving IRR Atlas maps;

(24) Processing Freedom of Information Act (FOIA) requests;

(25) Monitoring the obligation and expenditure of all IRR Program funds allocated to BIA region;

(26) Performing activities related the application for ERFO funds, administration, and oversight of such funds; and

(27) Participating in IRR Program, process, and product reviews.

(o) BIA DOT regional offices planning:

(1) Coordinating with tribal/state/ regional/local government;

(2) Coordinating and processing the funding and repair of damaged Indian reservation roads with tribes;

(3) Reviewing and approving IRR Inventory data;

(4) Maintaining, reviewing, and approving the management systems databases;

(5) Reviewing and approving IRR state transportation improvement programs; and

(6) Performing Federal responsibilities identified in the IRR Transportation Planning Procedures and Guidelines manual.

(p) BIA DOT regional offices engineering:

(1) Approving tribal standards for the IRR Program use;

(2) Developing and implementing new engineering techniques in the IRR Program; and

(3) Providing technical assistance.

(q) BIA DOT regional offices responsibilities for bridges:

(1) Reviewing and processing IRR bridge program applications;

(2) Reviewing and processing IRR bridge inspection reports and information; and

(3) Ensuring the safe use of roads and bridges.

(r) BIA DOT regional offices other responsibilities for performing other non-contractible required IRR Program activities contained in this part.

§ 170.602 How are the IRR non-contractible program and project functions funded?

(a) All non-contractible program functions are funded by IRR Program management and oversight funds; and

(b) All non-contractible project functions are funded by the IRR project construction funds.

§ 170.603 May tribes include the cost for contractible supportive administrative functions in their budgets?

Yes, Tribes may use IRR project funds contained in their contracts or annual funding agreements for contractible supportive administrative functions.

§ 170.604 How does BIA determine the amount of funds needed for non-contractible non-project related functions?

Each fiscal year the Secretary will develop a national and regional BIA IRR Program budgets. Within the first quarter of each fiscal year the Secretary will send a copy of the national IRR budget and BIA regional IRR budget to all tribes.

§ 170.605 Are the unused IRR Program management funds reserved by the Secretary considered residual funds?

No, the unused IRR Program management funds reserved by the Secretary are not considered residual funds.

170.606 What happens to the unused portion of IRR Program management funds reserved by the Secretary?

Any unused IRR Program management funds are distributed to BIA regions using the IRR Relative Need Formula and are used for additional construction activities.

§ 170.608 May IRR Programs be contracted under the ISDEAA?

Yes, IRR Programs may be contracted under the regulations set out in 25 CFR part 900. In the event of an actual conflict between these IRR regulations and part 900, subpart J of the regulations, these IRR regulations control.

§ 170.609 What are consortium contracts/agreements?

Under title I and title IV of the ISDEAA, multiple tribes and/or multi-tribal organizations are eligible to assume IRR Programs under consortium contracts or agreements. For an explanation of self-determination contracts, refer to Title I, 25 U.S.C. 450f. For an explanation of self-governance agreements, refer to Title IV, 25 U.S.C. 450b(l) and 458bb(b)(2).

§ 170.610 What must BIA include in the notice of availability of funds?

The notice of availability of funds that BIA publishes in the **Federal Register** must include the following:

(a) The total amount of IRR Program funds allocated to the region for IRR transportation planning, design, and construction projects;

(b) A breakdown of IRR Program funds by tribe based on the distribution formula in subpart C;

(c) Copies of the FHWA-approved IRR TIPs for each state in the BIA region;

(d) Information on IRR Program funding by tribe for prior years. This information will identify over-funded or advance-funded tribes;

(e) An offer of technical assistance in the preparation of contract proposal(s);

(f) A request of a 30-day response from the tribe;

(g) A proposed project listing used to develop the region's control schedule; and

(h) The various options available to the tribe for IRR construction projects, i.e., direct service, self-determination contract, and self-governance agreement.

§ 170.611 Can the Secretary transfer funds to tribal governments before issuing a notice of funding availability?

Yes, the Secretary can transfer funds to tribal governments with negotiated self-determination contracts and self-governance agreements before issuing a notice of funding availability. The Secretary's ability to transfer funding is independent of and cannot be delayed by the requirement to provide tribes with a written notice of availability of funds.

§ 170.612 Can a tribe enter into a self-determination contract or self-governance agreement that exceeds one year?

Yes, the Secretary can enter into a multi-year IRR self-determination contract and self-governance agreement with a tribe under sections 105(c)(1)(A) and (2) of the ISDEAA. The amount of such contracts or agreements is subject to the availability of appropriations.

§ 170.613 May a tribe receive advance payments of IRR funds for non-construction activities?

Yes, BIA must advance payments to a tribe for non-construction activities under 25 U.S.C. 450*f* for self-determination contracts on a quarterly, semiannual, lump-sum, or other basis proposed by a tribe and authorized by law.

§ 170.614 May the Secretary advance payments of IRR funds to a tribe under a self-determination contract for construction activities?

Yes, the Secretary and the tribe must negotiate a schedule of advance payments as part of the term of a self-determination contract in accordance with 25 CFR 900.132.

§ 170.615 What is a design/construct IRR self-determination contract?

It is a self-determination contract which includes both the design and construction of one or more IRR projects.

§ 170.616 May the Secretary advance payments of IRR funds to a tribe under a self-determination design/construct contract for construction activities?

Yes, when making at least quarterly advance payments for construction and construction engineering, the Secretary includes IRR Program funds based on progress, need, and the payment schedule negotiated under 25 CFR 900.132.

§ 170.617 May the Secretary advance payments of IRR funds to a tribe or consortia under a self-governance agreement?

Yes, advance payments must be made to the tribes/consortia in the form of annual or semiannual installments as indicated in the agreement.

§ 170.618 How are advance payments made when additional IRR funds are made available after execution of the self-governance agreement?

When additional IRR funds are available, following the procedures set forth in 25 CFR 1000.104, tribes can request to use the additional funds for approved IRR activities or projects contained in a subsequent year of FHWA-approved IRR TIP, and immediately have those funds added to the agreement.

§ 170.619 May a self-determination or self-governance tribe include a contingency in its proposal budget?

Yes, a tribe with a self-determination contract may include a contingency amount in its proposal budget in accordance with 25 CFR 900.127(e)(8). A tribe with a self-governance agreement may include a project-specific line item for contingencies if the tribe does not include its full IRR allocation in the agreement.

§ 170.620 Can Indian tribes and tribal organizations performing under self-determination contracts of self-governance agreements keep savings that result from their administration of IRR projects or an entire tribal IRR Program?

Pursuant to 25 U.S.C. 450e-2, where the actual costs of the contracts or agreements for construction projects are less than the estimated costs, use of the resulting excess funds shall be determined by the Secretary after consultation with the tribes.

§ 170.621 How do the ISDEAA's Indian preference provisions apply?

This section applies when the Secretary or a tribe enters into a cooperative agreement with a State or local government for an IRR construction project. The tribe and the parties may choose to incorporate the

provisions of section 7(b) in a cooperative agreement.

§ 170.622 Do tribal preference and Indian preference apply to IRR funding?

This section applies to any contract entered into under Title I of the ISDEAA.

(a) If the contract serves a single tribe, section 7(c) of the ISDEAA applies to allow the tribal employment or contract preference laws adopted by the tribe to govern. This includes tribal adoption of local preference laws.

(b) If the contract does not serve a single tribe, section 7(b) of the ISDEAA applies.

(c) Where a self-governance agreement exists under Title IV of the ISDEAA, 25 CFR 1000.406 governs Indian preference issues.

§ 170.623 What protections does the government have if a tribe fails to perform?

If a tribe substantially fails to perform a contract or agreement:

(a) For self-determination contracts, the Secretary must use the monitoring and enforcement procedures in 25 CFR 900.131(a)-(b) and part 900, subpart L (appeals); and

(b) For self-governance agreements, the Secretary must use the monitoring and enforcement procedures in 25 CFR 1000, subpart K.

§ 170.624 What activities may the Secretary review and monitor?

The Secretary reviews and monitors the performance of construction activities under 25 CFR 900.131.

§ 170.625 If a tribe incurs unforeseen construction costs, can it get additional funds?

Yes, to the extent feasible, the Secretary must pay for all costs (i.e., cost overruns) incurred resulting from unforeseen circumstances of the construction process. See 25 CFR 900.130(e). If the Secretary is unable to fund the unforeseen costs, the tribe can suspend or terminate work on the project and may return the project to the Secretary.

§ 170.626 When may BIA use force account methods in the IRR Program?

BIA may use force account methods in the IRR Program unless the tribe elects otherwise to enter into a self-determination contract or a self-governance agreement for IRR programs.

§ 170.627 What regulations apply to BIA force account project activities?

The applicable FAR and Federal law apply to BIA force account project activities.

§ 170.628 How do legislation and procurement requirements affect the IRR program?

Other legislation and procurement requirements apply to the IRR program as shown in the following table.

Legislation, regulation or other requirement	Applies to tribes under self-determination contracts	Applies to tribes under self-governance agreements	Applies to activities performed by the Secretary
(a) Buy Indian Act	No	No	Yes
(b) Buy American Act	No	No	Yes
(c) Federal Acquisition Regulation (FAR)	No ¹	No	Yes
(d) Federal Tort Claims Act	Yes	Yes	Yes
(e) Davis-Bacon Act	Yes ²	Yes ²	Yes

¹ Unless agreed to by the tribe or tribal organization under the ISDEAA, 25 U.S.C. 450j(a), and 25 CFR part 900.115(b).

² Does not apply when tribe performs work with its own employees.

§ 170.630 What regulations apply to waivers?

The following regulations apply to waivers:

- (a) For self-determination contracts, 25 CFR 900.140–148;
- (b) For self-governance agreements, 25 CFR 1000.220–232; and
- (c) For direct service, 25 CFR 1.2.

§ 170.631 How does a tribe request a waiver of a Department of Transportation regulation?

Tribes must follow the procedures in the ISDEAA, title I and 25 CFR 900.140 through 900.148 for self-determination contracts and ISDEAA, title IV, 25 CFR 1000.220 through 1000.232 for tribal self-governance agreements with a copy of the request sent to the Secretary of Transportation. When a waiver request is outside the Secretary's authority, the Secretary should forward the request to the Secretary of Transportation.

§ 170.632 Is technical assistance available for self-determination contracts and self-governance agreements under the ISDEAA?

Yes, for tribes or tribal organizations with questions about contracting the IRR Program or IRR project(s), technical assistance is available from BIA. For tribes or tribal organizations with questions about self-governance agreements for the IRR Program or IRR project(s), technical assistance is available from the office of self-governance and BIA.

Technical assistance can include, but is not limited to, assistance in the preparation of self-determination contract proposal(s) and self-governance agreements.

§ 170.633 What IRR programs, functions, services, and activities are subject to the construction regulations set forth in subpart K of 25 CFR part 1000?

All IRR design and construction projects and activities, whether

included separately or under a program in the agreement, are subject to the construction regulations set forth in subpart K of 25 CFR part 1000.

§ 170.634 How are IRR program projects and activities included in the self-governance agreement?

IRR Program projects and activities are included in the self-governance agreement as specific line items for each project or activity with sufficient detail to adequately describe the work as included in FHWA-approved IRR TIP and Control Schedule. Also, each agreement must include all other information required under 25 CFR 1000, subpart K.

§ 170.635 Are contract support funds provided in addition to the 2 percent (2%) IRR transportation planning funds?

Contract support costs are an eligible item out of the tribes' IRR Program funds allocation and need to be included in a tribe's budget.

§ 170.636 May contract support costs for IRR construction projects be paid out of Department of the Interior or BIA appropriations?

No, appropriations for the Department of the Interior do not include contract support costs for IRR construction projects as allowable expenditures.

Subpart F—Program Oversight and Accountability

§ 170.700 What is the IRR Program stewardship plan?

The IRR Program stewardship plan delineates the respective roles and responsibilities of BIA and FHWA in the administration of the IRR Program and the process used for fulfilling those roles and responsibilities.

§ 170.701 What is an IRR Program stewardship agreement?

It is an agreement between FHWA and BIA Division of Transportation for assuming FHWA's responsibilities for planning, design, and construction within the IRR Program.

§ 170.702 What is a BIA regional IRR Program stewardship agreement?

It is an agreement between FHWA, BIA Division of Transportation and a BIA regional office for assuming FHWA's responsibilities of the planning, design, and construction within the IRR Program.

§ 170.703 Can a self-determination contract or self-governance agreement serve as an IRR program stewardship agreement?

No, a tribe must use a tribal IRR Program stewardship agreement. It is a separate agreement which details the tribe's assuming a portion of FHWA's and/or BIA's responsibilities for planning, design, and construction within the IRR Program.

§ 170.704 What must be included in a BIA regional or tribal IRR Program stewardship agreement?

At a minimum, these agreements must include:

- (a) BIA regional roads or tribal transportation department organization chart;
- (b) An IRR project development and construction flow chart;
- (c) Description of the transportation planning, design, procurement, project administration, and construction processes to be followed;
- (d) IRR design and construction standards to be used in accordance with this part;
- (e) List of roles and responsibilities to be assumed;
- (f) Provisions and process for obtaining the Secretary's health and safety reviews of the PS&E; and

(g) Provisions and processes for obtaining the facility owner's review of the PS&E.

§ 170.705 What is the process for obtaining the facility owner's review of the PS&E?

The process is as follows:

(a) BIA region or tribe prepares and submits an IRR Program stewardship agreement to BIA Division of Transportation. BIA Division of Transportation forwards a copy to FHWA;

(b) BIA and FHWA visit the tribe or BIA region and evaluate the capabilities to assume the proposed IRR Program responsibilities;

(c) FHWA, in writing, advises the tribe or BIA region of any applicable changes to the proposed stewardship agreement; and

(d) After all changes are made, the revised agreement is approved by FHWA or its designee.

§ 170.706 Can a direct service tribe and BIA region sign a Memorandum of Understanding (MOU)?

Yes, an IRR tribal/BIA region MOU is a document that a direct service tribe and BIA may enter into to help define the roles, responsibilities and consultation process between the regional BIA office and the Indian tribal government. It describes how the IRR Program will be carried out by BIA on the tribe's behalf.

§ 170.707 Are there licensing requirements to ensure standards are met under the IRR Program?

Yes, all engineering work must be performed under the direction of a professionally licensed engineer.

§ 170.708 Must an IRR PS&E be approved before proceeding to construction?

Yes, an IRR PS&E must be approved before proceeding to construction.

Subpart G—BIA Road Maintenance

§ 170.800 What Is IRR Transportation Facility Maintenance?

Maintenance is the performance of activities to keep an IRR transportation

facility at its as constructed condition and to insure the health, safety, and economical use of the traveling public. Maintenance means the preservation of IRR transportation facilities including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for safe and efficient utilization of the facility.

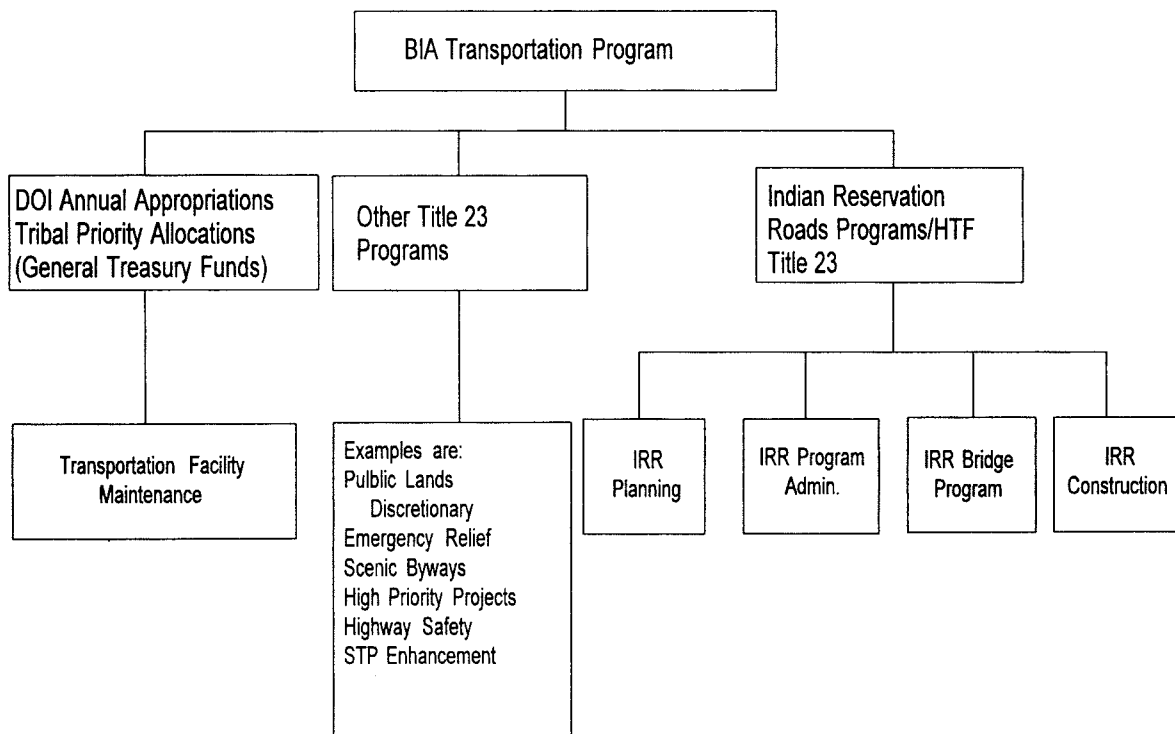
§ 170.801 Who owns IRR Transportation Facilities?

IRR transportation facilities are owned by public authorities such as tribes, States, counties, local governments and the Federal Government.

§ 170.802 How is BIA Road Maintenance Program related to the IRR Program?

The following chart illustrates how the BIA Road Maintenance Program is related to other Title 23 United States Code programs and other BIA appropriated programs.

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§ 170.803 How is road maintenance funded?

BIA road maintenance program is funded through the Department of the Interior annual appropriations. All other

programs are funded out of the Highway Trust Fund as shown in this subpart.

(a) The States, counties, and local governments fund the maintenance of IRR transportation facilities that they own or have agreed to maintain.

(b) The U.S. Congress funds a BIA program for the maintenance of IRR transportation facilities as defined in this part through annual appropriations for the Department of the Interior.

(c) Tribal governments, at their discretion, may also provide for the

maintenance of IRR transportation facilities.

§ 170.804 What is the BIA Road Maintenance Program?

The BIA Road Maintenance Program is the name of the program that covers the distribution and use of the funds provided by Congress in the annual Department of Interior appropriations acts for maintaining transportation facilities.

§ 170.805 What facilities are eligible for maintenance and operation under the BIA Road Maintenance Program?

(a) The following public transportation facilities are eligible for maintenance under the BIA Road Maintenance Program:

- (1) BIA facilities listed in paragraph (b) of this section;
 - (2) Non-BIA facilities, if the tribe served by the facility feels that maintenance is required to ensure public health, safety, and economy, and if the tribe executes an agreement with the owning public authority within available funding;
 - (3) Tribal transportation facilities such as public roads, bridges, trails, and bus stations; and
 - (4) Other transportation facilities as approved by the Secretary.
- (b) The following BIA facilities are eligible for maintenance under paragraph (a)(1) of this section:
- (1) The BIA road system and related road appurtenances such as signs, traffic signals, pavement striping, trail markers, guardrails, etc.;
 - (2) Bridges and drainage structures;
 - (3) Airport runways and heliport pads;
 - (4) Boardwalks;
 - (5) Adjacent parking areas;
 - (6) Maintenance yards;
 - (7) Bus stations;
 - (8) System public pedestrian walkways, paths, bike and other trails;
 - (9) Motorized trails;
 - (10) BIA and tribal post-secondary school roads and parking lots built with IRR Program Funds; and
 - (11) Public ferryboats.

§ 170.806 Is maintenance required on facilities built with federal funds?

Yes, maintenance is required on all IRR facilities built with federal transportation funds.

§ 170.807 Do BIA or the tribes have to perform all of the IRR facility maintenance?

(a) State, county, and local governments normally perform the maintenance of their IRR transportation facilities.

(b) Tribes may perform or provide for their maintenance responsibilities by

formal agreement or other contracts with any other, State, county, or local government.

(c) BIA's responsibility includes preparing annual budget requests under 23 U.S.C. 204(c) that include a report of the shortfalls in each Region in appropriations of BIA Road Maintenance dollars.

§ 170.808 What activities are eligible for funding under the BIA Road Maintenance Program?

Appendix A to this subpart contains a list of activities that are eligible for funding under the BIA road maintenance program.

§ 170.809 What is an IRR TFMMS?

The IRR Transportation Facilities Maintenance Management Systems (TFMMS) is a tool used by BIA and tribes to budget, prioritize, and efficiently schedule all transportation facility maintenance activities. It is employed to extend the life of an IRR transportation facility, ensure safety and report future funding needs to the Secretary.

§ 170.810 What must an effective IRR TFMMS include at a minimum?

- (a) At a minimum the IRR TFMMS system must include components for:
- (1) Uniformly collecting, processing, and updating data;
 - (2) Predicting facility deterioration;
 - (3) Identifying alternative actions;
 - (4) Projecting maintenance costs;
 - (5) Tracking and reporting of actual maintenance costs and activities accomplished;
 - (6) Forecasting short- and long-term budget needs;
 - (7) Recommended programs and schedules for implementation within policy and budget constraints;
 - (8) Tracking and reporting unmet needs; and
 - (9) Ability to produce various reports, including customized reports.
- (b) The minimum data requirements include:
- (1) Cost of maintenance activity per mile broken down by surface type and frequency of activity;
 - (2) Cost of bridge maintenance by surface area of deck and frequency of activity;
 - (3) Cost of maintenance of other inter-modal facilities;
 - (4) Information from other IRR management systems;
 - (5) Future needs; and
 - (6) Basic facility data including but not limited to route, bridge number, maintenance activity code, facility inspection dates.

§ 170.811 Can Maintenance Program funds be used to upgrade IRR facilities?

No, BIA Road maintenance Program funds must not be used to upgrade roads or other IRR transportation facilities to a higher road classification, standard or capacity.

§ 170.812 Can tribes enter into a self-determination contract or self-governance agreement for the BIA Road Maintenance Program?

Yes, any tribe may enter into contracts or self-governance agreements to conduct IRR transportation facility maintenance under the ISDEAA and 25 CFR part 900 or 1000. This self-determination contract or self-governance agreement does not relieve BIA of its responsibility for maintenance.

§ 170.813 To what standards must an IRR transportation facility be maintained?

IRR transportation facilities must be maintained, subject to availability of funding, in accordance with standards referred to in this part as the IRR Transportation Facility Maintenance Standards (IRR-TFMS). The Secretary will develop these standards with the assistance of the IRR Program Coordinating Committee. The Secretary must accept as interim standards any tribal maintenance standards that meet or exceed applicable Federal standards. Interim standards must include any or a combination of the following:

- (a) Appropriate National Association of County Engineers maintenance standards;
- (b) AASHTO road and bridge maintenance manuals, latest edition; or
- (c) Other applicable Federal, State, tribal, or local government maintenance standards as may be negotiated in an ISDEAA road maintenance contract or self-governance agreement.

§ 170.814 Can BIA Road Maintenance funds be used for heliport facilities?

BIA road maintenance funds may be used to maintain heliports, runways, and public access roads to these facilities.

§ 170.815 What happens if a facility is not being maintained due to lack of funds?

If the Secretary determines that an IRR transportation facility is not being maintained under IRR-TFMS standards due to insufficient funding, the Secretary must report these findings to Congress under 23 U.S.C. 204.

§ 170.816 Must IRR bridge inspections be coordinated with tribal and local authorities?

(a) The certified bridge inspectors working for BIA, State, county or local

governments (per 23 CFR 650.307) must coordinate with the affected tribes, BIA Regional offices, and State or local governments before performing IRR bridge inspections. This coordination must include prior written notification to the tribal and other local public authorities and the opportunity to accompany the inspectors.

(b) When a tribe enters into an ISDEAA contract or self-governance agreement to perform bridge inspections, the certified bridge inspectors working for the tribe must coordinate with the BIA Regional office, and affected State or local governments before performing IRR bridge inspections. Such coordination must include prior written notification to the BIA Regional office and other local public authorities and the opportunity to accompany the inspectors.

§ 170.817 What are the minimum qualifications for certified bridge inspectors?

(a) The person responsible for the bridge inspection team is not required to be on site during all phases of the bridge inspection. The responsible person must possess one or more of the following minimum qualifications:

- (1) Be a registered professional engineer;
- (2) Be qualified for registration as a professional engineer under the laws of the State; or
- (3) Have a minimum of 10 years experience in bridge inspection assignments in a responsible capacity and have completed a comprehensive training course based on the "Bridge Inspector's Training Manual," as revised.

(b) The person signing the bridge inspection report must possess one or more of the following minimum qualifications:

- (1) Have the qualifications specified for the individual in charge of the organizational unit delegated the responsibilities for bridge inspection;
- (2) Have a minimum of 5 years experience in bridge inspection assignments in a responsible capacity and have completed a comprehensive training course based on the "Bridge Inspector's Training Manual," as revised; or
- (3) Have a current certification as a Level III or IV Bridge Safety Inspector under the National Society of Professional Engineer's program for National Certification in Engineering Technologies (NICET) is an alternate acceptable means for establishing that a bridge inspection team leader is qualified.

§ 170.818 Must bridge inspection reports be reviewed?

Yes, the data required to complete the forms and the functions that must be performed to compile the data are contained in section 3 of the AASHTO Manual. Copies of all IRR bridge inspection reports are sent to the respective BIA regional office. The BIA regional office reviews the reports and furnishes the report to the affected tribe for review, comment and use in the programming of transportation projects. After review, the inspection reports for BIA bridges are forwarded to BIADOT for quality assurance and inclusion into the National Bridge Inventory (NBI).

§ 170.819 How often are IRR bridge inspections performed?

IRR Bridge inspections must be performed at least every two years to update the NBI using standards that meet or exceed applicable federal standards (23 CFR 650.305).

§ 170.820 What standards are used for bridge inspections?

(a) Federal standards for bridge inspections are found in 23 CFR 650, subpart C.

(b) Tribes may develop alternative bridge inspection standards, provided that these standards meet or exceed applicable Federal standards.

§ 170.821 What is emergency maintenance?

Emergency maintenance is work that must be accomplished immediately because of life threatening circumstances. Examples of emergency maintenance include: Ice and snow control, traffic control, work in slide areas, repairs to drainage washouts, retrieving hazardous materials, suppressing wild fires, and repairing the ravages of other natural disasters.

§ 170.822 What is a Declared State of Emergency?

This is an official declaration of emergency by Federal, State, tribal, or local governments for adverse acts of nature that cannot be scheduled or planned in advance such as wind, earthquakes, floods, fire, and other acts of God.

§ 170.823 When can access to IRR transportation facilities be restricted?

(a) The Secretary may, in consultation with a tribe, restrict or temporarily close an IRR transportation facility to public use for the following reasons:

- (1) During unsafe conditions;
- (2) During natural disasters;
- (3) For fish or game protection;
- (4) To prevent traffic from causing damage to the facility; and

(5) For reasons deemed to be in the public interest such as fire prevention or suppression as approved by the Secretary.

(b) Certain IRR Transportation facilities owned by the tribes or BIA may be permanently closed when the tribal governments and the Secretary have agreed the facility's use is no longer needed. Once this determination is made, the facility must be removed from the IRR Transportation Facility Inventory and the BIA Transportation System.

Appendix A to Subpart G

List of Activities Eligible for Funding Under The BIA Transportation Facility Maintenance Program

The following activities are eligible for BIA Transportation Facility Maintenance Program. The list is not all-inclusive.

1. Cleaning and repairing ditches and culverts.
2. Stabilizing, removing, and controlling slides, drift sand, mud, ice, snow, and other impediments.
3. Adding additional culverts to prevent roadway and adjoining property damage.
4. Repairing, replacing or installing traffic control devices, guardrails and other features necessary to control traffic and protect the road and the traveling public.
5. Removing roadway hazards.
6. Repairing or developing stable road embankments.
7. Repairing parking facilities and appurtenances such as striping, lights, curbs, etc.
8. Repairing transit facilities and appurtenances such as bus shelters, striping, sidewalks, etc.
9. Training maintenance personnel.
10. Administration of the BIA Transportation Facility Maintenance Program.
11. Performing environmental/archeological mitigation associated with transportation facility maintenance.
12. Leasing, renting, or purchasing of maintenance equipment.
13. Paying utilities cost for roadway lighting and traffic signals.
14. Purchasing maintenance materials.
15. Developing, implementing, and maintaining an IRR Transportation Facility Maintenance Management System (TFMMS).
16. Performing pavement maintenance such as pot hole patching, crack sealing, chip sealing, surface rejuvenation, and thin overlays (less than 1 inch).
17. Performing erosion control.
18. Controlling roadway dust.
19. Re-graveling roads.
20. Controlling vegetation through mowing, noxious weed control, trimming, etc.
21. Making bridge repairs.
22. Paying the cost of closing of transportation facilities due to safety or other concerns.
23. Maintaining airport runways, heliport pads, and their public access roads.
24. Maintaining and operating BIA public ferriesboats.

25. Making highway alignment changes for safety reasons. These changes require prior notice to the Secretary.

26. Making temporary highway alignment or relocation changes for emergency reasons.

27. Maintaining other IRR intermodal transportation facilities provided that there is a properly executed agreement with the owning public authority within available funding.

Subpart H—Miscellaneous

Hazardous and Nuclear Waste Transportation

§ 170.900 What is the purpose of the provisions relating to transportation of hazardous and nuclear waste?

Sections 170.900 through 170.907 on transportation of nuclear and hazardous waste are provided for information only, do not create any legal responsibilities or duties for any person or entity, and are not intended to create any basis for a cause of action under the Federal Tort Claims Act.

§ 170.901 What standards govern transportation of radioactive and hazardous materials?

DOT, International Atomic Energy Agency, U.S. Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency have established standards and regulations for the shipment of radioactive and hazardous materials. Legal authority includes, but is not limited to, 23 U.S.C. 141; 23 U.S.C. 127; 49 CFR parts 107, 171 through 180; 10 CFR part 71.

§ 170.902 What transport activities do State, tribal, and local governments perform?

State, tribal, and local governments typically provide for the safety of their residents and other persons and protection of resources within their jurisdictions. With respect to radioactive and hazardous materials, some state, tribal, and local governments choose to enact legislation, execute cooperative agreements, designate alternate transportation routes, develop emergency response plans, perform emergency response, issue permits, conduct vehicle inspections, enforce traffic laws, and perform highway construction and maintenance. These activities must not conflict with Federal laws and regulations.

§ 170.903 How is a tribe notified of the transport of radioactive waste?

The Department of Energy (DOE) has elected, by policy, to notify tribal governments of DOE shipments through their jurisdiction.

§ 170.904 Who responds to an accident involving a radioactive or hazardous materials shipment?

Tribal, federal, local, and state police, fire departments, and rescue squads are often the first to respond to transportation accidents involving radioactive or hazardous materials. If radioactive materials are involved, then DOE typically takes steps to ensure that the appropriate state and tribal agencies are contacted and coordinate any necessary Radiological Assistance Program team activities. These teams may include nuclear engineers, health physicists, industrial hygienists, public affairs specialists, and other personnel who provide field monitoring, sampling, decontamination, communications, and other services as may be requested.

§ 170.905 Can tribes use IRR Program funds for training in handling radioactive and hazardous material?

No, Tribes cannot use IRR Program construction funds to train personnel to handle radioactive and hazardous material.

§ 170.906 Can tribes obtain training in transporting hazardous material?

Yes, Tribes are encouraged to seek training from DOE, EPA, NRC, OSHA, states, and other sources. Funding is available from the U.S. DOT under the Hazardous Materials Uniform Safety Act, EPA for monitoring and FEMA for general preparedness. DOE is working with states and tribes to develop a uniform grant for transportation planning for accommodating radioactive and hazardous material transport.

§ 170.907 How are radioactive and hazardous material spills addressed?

The carrier is typically responsible for clean-up with assistance from the shipper using established standards and guidelines. The carrier of the cargo should work with the appropriate tribal, local, state and federal agencies to address all cleanup issues, such as arranging or repackaging of the cargo, if necessary, and disposing of contaminated materials.

Reporting Requirements and Indian Preference

§ 170.910 What information on the IRR Program or projects must BIA provide to tribes?

At the written request of a tribe, BIA must provide available information on the IRR Program within 15 workdays of the request.

§ 170.915 Are Indians entitled to employment and training preferences?

Yes, Federal law gives hiring and training preferences to Indians for all

work performed under the IRR Program. Tribal governments and BIA must, to the greatest extent feasible, give hiring and training preferences to Indians when operating IRR programs or projects.

§ 170.916 Are Indian organizations and Indian-owned businesses entitled to a contracting preference?

Yes, under 25 U.S.C. 450e(b) and 23 U.S.C. 204(e), Indian organizations and Indian-owned economic enterprises are entitled to a preference, to the greatest extent feasible, in the award of contracts, subcontracts and sub-grants for all work performed under the IRR Program.

§ 170.918 Is Indian preference permitted for federally funded non-IRR transportation projects?

(a) Indian employment preference is permitted for federally-funded transportation projects not funded under the IRR Program if the project is carried out on an Indian Reservation Road.

(b) Tribal, State, and local governments may provide an employment preference to Indians when administering Federal Lands Highway and Federal-Aid Highway projects on Indian reservation roads. (See 23 U.S.C. 140(d), 204(b), 204(e), and 23 CFR 635.117.)

(c) Tribes may target recruiting efforts toward Indians living on or near Indian reservations, Indian lands, Alaska Native villages, pueblos, and Indian communities.

(d) Tribes and tribal employment rights offices are encouraged to work cooperatively with State and local governments to develop contract provisions promoting employment opportunities for Indians on eligible federally-funded transportation projects. Tribal, State, and local Representatives should confer to establish Indian employment goals for these projects. Once established, the agencies should only change these employment goals after consultation with the affected Indian tribal government(s).

§ 170.919 May tribal-specific employment rights and contract preference laws apply to IRR projects?

Yes, when a tribe or consortium administers an IRR Program intended to benefit that tribe or a tribe within the consortium, the benefiting tribe's employment rights and contracting preference laws apply. (See 25 U.S.C. 450e(c).)

§ 170.920 What is the difference between tribal preference and Indian preference?

Indian preference is a preference for Indians in general. Tribal preference is a preference adopted by a tribal government that may or may not include a preference for Indians in general, Indians of a particular tribe, Indians in a particular region, or any combination thereof.

§ 170.921 May the cost of tribal employment taxes or fees be included in the budget for an IRR project?

Yes, the cost of tribal employment taxes or fees may be included in the budget for an IRR program or project, except for BIA force account.

§ 170.922 May tribes impose taxes or fees on those performing IRR Program services?

Yes, Tribes, as sovereign nations, have inherent authority to impose taxes and fees for IRR activities on or near Indian reservations. When a tribe administers IRR programs or projects under the ISDEAA, its tribal employment and contracting preference laws, including taxes and fees, apply to those IRR activities whether or not the activities occur within the tribe's territorial jurisdiction.

§ 170.923 Can tribes receive direct payment of tribal employment taxes or fees?

This section applies to non-tribally-administered IRR projects. Tribes can request that BIA pay tribal employment taxes or fees directly to them under a voucher or other written payment instrument, based on a negotiated payment schedule. Tribes may consider requesting direct payment of tribal employment taxes or fees from other transportation departments in lieu of receiving their payment from the contractor.

Emergency Relief**§ 170.924 What is the purpose of the provisions relating to emergency relief?**

Sections 170.924 through 170.932 relating to emergency relief are provided for information only and do not change the provisions of 23 CFR part 668 or existing guidance on emergency relief.

§ 170.925 What emergency or disaster assistance programs are available?

(a) FHWA operates two emergency relief programs:

(1) The Emergency Relief (ER) Program, which provides disaster assistance for Federal-aid highways owned by State, county and local governments; and

(2) The Emergency Relief for Federally Owned Roads (ERFO) Program, which provides disaster

assistance for Federal roads, including Indian reservation roads, which have been damaged due to natural disasters (floods, hurricanes, tornadoes, etc.).

(b) The Federal Emergency Management Agency (FEMA) may be considered as an alternate funding source to repair damage that is ineligible under the ER or ERFO Programs.

§ 170.926 How can States get Emergency Relief Program funds to repair IRR System damage?

A State can request emergency relief program funds to repair damage to Federal-aid highways caused by natural disasters or catastrophic failures. It is the responsibility of individual States to request these funds.

§ 170.927 What qualifies for ERFO funding?

Tribes can use Emergency Relief for Federally Owned Roads (ERFO) funding to repair damage to Indian reservation roads, bridges, and related structures caused by natural disaster over a widespread area or by a catastrophic failure from any external cause. The Secretary of Transportation or his/her designee determines eligible repairs according to procedures in 23 CFR part 668, subpart B.

(a) Examples of natural disasters include, but are not limited to, floods, earthquakes, tornadoes, landslides, avalanches or severe storms, such as saturated surface conditions and/or high-water table caused by precipitation over an extended period of time.

(b) An example of a catastrophic failure includes, but is not limited to, a bridge collapse after being struck by a barge, truck or a landslide.

§ 170.928 What does not qualify for ERFO funding?

Structural deficiencies, normal physical deterioration, and routine heavy maintenance do not qualify for ERFO funding. The Secretary of Transportation or his/her designee determines eligible repairs according to procedures set forth in 23 CFR part 668, subpart B.

§ 170.929 What happens if an ERFO claim is denied?

If DOT denies an ERFO claim, BIA or the affected Indian tribe may appeal the finding or determination to the Secretary of Transportation or his/her designee. The appealing tribe must provide a courtesy copy of its appeal to BIA.

§ 170.930 Is ERFO funding supplemental to IRR Program funding?

Yes, if ERFO funds are approved and available, they can be used to

supplement IRR construction and maintenance funds for FHWA-approved repairs. If IRR construction or maintenance funds are used to address an approved claim when ERFO funds are unavailable, the next available ERFO funds may be used to reimburse the construction or maintenance funds expended.

§ 170.931 Can a tribe administer ERFO repairs under a self-determination contract or a self-governance agreement?

Yes, ERFO funding is not part of the recurring base funding in a self-determination contract or self-governance agreement.

§ 170.932 How can FEMA Program funds be accessed to repair damage to the IRR System?

A tribe can request FEMA Program funds for emergency repairs to damaged roads on the IRR system if the President has declared a major disaster or emergency. The tribe makes the request by submitting an SF 424, Application for Federal Assistance, directly to FEMA, as described in FEMA Response and Recovery Directorate 9512.4 (Dec. 28, 1999). Tribes can also ask States to seek FEMA Program funds to repair damage to roads in the IRR System.

Tribal Transportation Departments**§ 170.936 Can a tribe establish a Tribal Transportation Department?**

Yes, Tribal governments, as sovereign nations, have inherent authority to establish their own transportation departments under their own tribal laws.

§ 170.937 How can tribes find out information about staffing and organization of tribal transportation departments?

Tribes may staff and organize transportation departments in any manner that best suits their needs. Tribes can receive technical assistance from Indian LTAP centers, BIA road engineers, or AASHTO to establish a tribal transportation department.

§ 170.938 Are there any other funding sources available to operate tribal transportation departments?

There are many sources of funds that may help support a tribal transportation department. These include, but are not limited to, the sources listed below. Note that each source has its own terms and conditions of assistance.

- (a) Tribal general funds;
- (b) Tribal Priority Allocation (TPA);
- (c) Revenue from States and counties;
- (d) Fare collections;
- (e) Aviation fees;
- (f) Tribal permits and license fees;
- (g) Tribal fuel tax;

(h) Federal, state, private and local transportation grants assistance;
 (i) Funds for transit, safety and education from other federal programs;
 (j) TERO fees;
 (k) Capacity building grants from Administration for Native Americans and other organizations; and
 (l) Federal Aviation Administration grants and education from other federal programs.

§ 170.939 Can tribes use IRR Program funds to pay for costs to operate a tribal transportation department?

Yes, Tribes can use IRR Program funds to pay the cost of administration and performance of approved IRR Program activities. Tribes can also use BIA road maintenance funds to pay the cost of administration and performance of maintenance activities under this part.

§ 170.940 Can tribes regulate oversize or overweight vehicles?

Yes, Tribal governments, as sovereign nations, have the authority to regulate travel on roads under their jurisdiction and to establish a permitting process to regulate the travel of oversize or overweight vehicles, in accordance with applicable federal law. BIA may, with the consent of the affected tribe, establish a permitting process to regulate the travel of oversize or overweight vehicles on BIA-system roads.

Arbitration Provisions

§ 170.941 Are alternative dispute resolution procedures available to self-determination and self-governance tribes and the Secretary to resolve disputes between them in performing IRR Public Law 93-638 activities?

Yes, except as required in 25 CFR part 900 and part 1000, tribes and tribal organizations are entitled to use the appropriate dispute resolution techniques or procedures set out in:

- (a) The ADR Act, 5 U.S.C. 571-583;
- (b) The Contract Disputes Act, 41 U.S.C. 601-613; and
- (c) The Indian Self-Determination and Education Assistance Act (including the mediation and alternative dispute resolution options listed in 25 U.S.C.

4501 (model contract section (b)(12)) and the implementing regulations for non-construction activities.

§ 170.942 Are alternative dispute resolution procedures available to resolve IRR program disputes?

Yes, Federal agencies are authorized and encouraged to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes brought by IRR Program beneficiaries. The goal of these alternative dispute resolution (ADR) procedures is to provide an inexpensive and expeditious forum to resolve disputes. Federal agencies are authorized and encouraged to resolve disputes at the lowest possible staff level and in a consensual manner whenever possible.

§ 170.943 How does a direct service tribe begin the alternative dispute resolution process?

(a) To begin the ADR process, a direct service tribe must write to the Regional Director or the Chief of the BIA Division of Transportation. The letter must:

- (1) Ask to begin one of the alternative dispute resolution (ADR) procedures in the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571-583 (ADR Act); and
 - (2) Explain the factual and/or legal basis for the dispute.
- (b) ADR proceedings will be governed by procedures in the ADR Act and the implementing regulations.

Other Miscellaneous Provisions

§ 170.950 How can a tribe or tribal organization find out if the ISDEAA has superseded an IRR provision?

Any tribe or tribal organization may ask the Secretary for a determination that the ISDEAA has superseded a law or regulation. This would mean that the law has no applicability to any contract or self-governance agreements.

- (a) The Secretary must provide an initial decision on the request within 75 days after receipt.
- (b) If the Secretary denies the request, the tribe or tribal organization may appeal under 25 CFR 900.150 and 1000.201.
- (c) The Secretary must provide notice of each determination made under this

subpart to all tribes and tribal organizations.

§ 170.951 Can tribes become involved in transportation research?

Yes, Tribes may:

- (a) Participate in Transportation Research Board meetings, committees, and workshops sponsored by the National Science Foundation;
- (b) Participate in and coordinate the development of tribal and IRR transportation research needs;
- (c) Submit transportation research proposals to States, FHWA, AASHTO, and FTA;
- (d) Prepare and include transportation research proposals in their IRR TIPS;
- (e) Access Transportation Research Information System Network (TRISNET) database; and
- (f) Participate in transportation research activities under Intergovernmental Personnel Act agreements.

§ 170.952 Are federal funds available for coordinated transportation services for a tribe's Welfare-to-Work, Temporary Assistance to Needy Families, and other quality of life improvement programs?

Yes, IRR Program funds can be used to coordinate transportation related activities in conjunction with tribal resources to help provide adequate access to jobs and make education, training, childcare, healthcare and other services more accessible to tribal members as part of IRR Program transportation planning activities. IRR Program funds may also be used as the matching share for other federal, state, and local mobility programs. To the extent authorized by law, additional grants and programs funds are available for this purpose from other Federal programs administered by such departments as the Department of Transportation, Department of Health and Human Services and Department of Labor. Tribes are also encouraged to apply for federal and state public transportation and personal mobility programs grants and funds.

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