

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****25 CFR Part 170****RIN 1076-AE17****Indian Reservation Roads Program****AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

SUMMARY: This final rule establishes policies and procedures governing the Indian Reservation Roads (IRR) Program. The IRR Program is a part of the Federal Lands Highway Program established to address transportation needs of tribes. The program is jointly administered by the Bureau of Indian Affairs (BIA) and Federal Highway Administration's (FHWA) Federal Lands Highway (FLH) Office. It expands transportation activities available to tribes and tribal organizations and provides guidance for planning, designing, constructing, and maintaining transportation facilities. It also establishes a funding distribution methodology called the Tribal Transportation Allocation Methodology (TTAM). The TTAM includes a factor for allocating IRR Program funds based on the relative needs of tribes and reservation or tribal communities for transportation assistance. It also addresses the administrative capacities of, and challenges faced by, various tribes including the cost of road construction, geographic isolation, and difficulty in maintaining all weather access to essential resources and services. The TTAM provides funding for Indian Reservation Roads High Priority Projects that would not otherwise have sufficient funding; and makes available a minimum allocation to tribes if funding levels are sufficient.

DATES: *Effective Date:* October 1, 2004.**ADDRESSES:** LeRoy Gishi, Chief, Division of Transportation, Bureau of Indian Affairs, 1951 Constitution Avenue, NW., MS-320-SIB, Washington, DC 20240, Telephone 202-513-7711 or Fax 202-208-4696.**SUPPLEMENTARY INFORMATION:****I. Background**

What Information Does This Section Address?

This section addresses:

- The Transportation Equity Act for the 21st Century (TEA-21), Public Law (Pub. L.) 105-178;
- The IRR Program;
- Publication of the NPRM;
- Public comments.

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. Congress has extended TEA-21 and authorized the use of Federal Highway Trust funds into fiscal year 2004. A new transportation authorization bill is currently before Congress.

TEA-21 contained several provisions that directly affect the Indian Reservation Roads (IRR) program. TEA-21:

- Authorized \$1.6 billion for the IRR Program for fiscal years 1998-2003;
- Provided that an Indian tribal government may request to enter into contracts or agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638, as amended, for IRR Program roads and bridges;
- Established the Indian Reservation Roads Bridge Program (IRRB), codified at 23 U.S.C. 202 (d)(3)(B) under which a minimum of \$13 million of IRR Program funds was set aside for a nationwide priority program for improving deficient IRR bridges. (On May 8, 2003, the Federal Highway Administration published a final rule for the IRR bridge program (68 FR 24642, now found at 23 CFR 661); and
- Required negotiated rulemaking between representatives of Indian tribes and the Federal Government (Department of the Interior (DOI) and Department of Transportation (DOT)) to develop IRR Program procedures and a funding formula to distribute IRR Program funds.

What Is the Indian Reservation Roads Program?

The Indian Reservation Roads (IRR) Program is a part of the Federal Lands Highway Program established in 23 U.S.C. 204 to address transportation needs of tribes. The program is jointly administered by the Bureau of Indian Affairs (BIA) and Federal Highway Administration's (FHWA) Federal Lands Highway (FLH) Office. 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 DOI 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. The 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 for IRR projects on or near Indian reservations according to the annual approved priority program of projects (for further background information on the IRR Program see 67 FR 51328, August 7, 2002). The duties and responsibilities of BIA and FHWA are described in a Memorandum of Agreement between the two agencies.

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 2003, the IRR system consisted of approximately 25,700 miles of BIA and tribally-owned public roads and 38,000 miles of state, county, and local government public roads.

How Is the IRR Program Funded?

From the DOT appropriation, FHWA reserves an amount specified in 23 U.S.C. 204 or in the DOT annual appropriations act. BIA and FHWA jointly administer the distribution of IRR Program funds under applicable laws and regulations.

Where Is Information on the TEA-21 Negotiated Rulemaking Process Found?

Information on the TEA-21 Negotiated Rulemaking process is found at 67 FR 51328, August 7, 2002.

How Did the Department Handle Public Comments to the Notice of Proposed Rulemaking (NPRM)?

The NPRM, published August 7, 2002, provided for a 60-day comment period which was extended an additional 30 days to November 7, 2002. The DOT's Dockets Management Facility received

electronic and written comments and posted them on its Web site at <http://dms.dot.gov>. We received responses from 1586 commenters. Most responses contained more than one comment on a variety of issues in the NPRM. At the close of the public comment period, DOI contracted with the U.S. Forest Service's Content Analysis Team to compile, organize, and summarize the public comments. The TEA-21 Negotiated Rulemaking Committee (Committee) reconvened in February and March, 2003, to review and consider the comment summation and make recommendations for the final rule based on public comments. All comments were carefully considered.

Some commenters made recommendations for changes that were not accepted or not acted upon for various reasons (such as requests for unnecessary detail, unclear requests, requests or comments that were unresponsive to the proposed rule or comments that were beyond the scope of the rule). Some commenters made statements of opinion or position, but requested or indicated no changes. Several commenters discussed issues that were the responsibility of other government entities and were therefore beyond the authority of the Secretary of the Interior to change. We did not adopt these changes. Some commenters requested modifications that required additional statutory authority and their comments could not be adopted. A few commenters made suggestions for grammatical and organizational changes which were adopted.

The Committee either accepted comments, accepted comments with modification(s), or rejected comments. DOI reviewed the Committee's recommendations on the public comments for the final rule. The discussion of changes from the NPRM to this final rule included in this preamble reflect major substantive public comments received on the NPRM. The full public comment compilation and summation report is available at <http://www.dot.gov>, or by contacting the Chief, Division of Transportation, Bureau of Indian Affairs, at the address provided in the **ADDRESSES** section of this preamble.

In addition to changes the Committee made based on public comments, DOI reviewed the rule for legal and policy issues and edited the rule for clarity, conciseness, and **Federal Register** format. Some sections were combined or rearranged and others were revised under Departmental or **Federal Register** requirements. Where questions and answers were found not to be entirely consistent in language, we revised them

for consistency. We also made editorial and substantive changes to clarify or correct errors or omissions in the NPRM. These include changes to Subpart C—Indian Reservation Roads Program Funding. Because the funding methodology is central to this rule it was essential that DOI thoroughly understand the details and ultimate purpose of the tribally-proposed TTAM in order to implement it. On two separate occasions we verified the intent of the tribally-proposed TTAM with tribal committee representatives. Based on the verification of intent from the Committee and on public comments, we found errors in the data contained in the tables and appendices for Subpart C. The proposed funding model (the simplified approach) was the mathematical model published in the NPRM. This model was mathematically incomplete because it did not account for all possible combinations for use of eligible data. Because this distribution of data affected all tribes, the TTAM could not be implemented with the existing data. We corrected data errors and edited tables to make them consistent with Subpart C and to ensure implementation of the TTAM. We did not change defaults and items that tribal representatives negotiated. We made substantive changes in the IRRHPP sections because they were internally inconsistent. For example, the time lines for IRRHPP applications and approvals were inconsistent with availability of funding from FHWA. The TTAM published in this final rule reflects the intent of the proposed funding methodology developed under negotiated rulemaking.

Key Areas of Disagreement

The NPRM Preamble contained Key Areas of Disagreement upon which the TEA-21 Negotiated Rulemaking Committee was unable to reach consensus. For each of the disagreement items the tribal and Federal sides presented their views, followed by their respective proposed questions and answers on those issues in the NPRM. The Administrative Procedure Act requires notice and comment on proposed rules which necessitates including the disagreement item questions and answers in the NPRM. We included the Federal version of the questions and answers for disagreement items in the appropriate subparts of the NPRM for comment. In addition, for easy reference within the NPRM preamble, we listed the section numbers where we inserted the Federal proposed sections for each of the sections on disagreement items.

During consideration of the public comments, the tribal and Federal representatives discussed the disagreement items and, based on public comments, resolved six areas of disagreement from the NPRM. The Committee made recommendations for changes on these in the final rule and DOI adopted them, revising the relevant sections in the final rule. A discussion of the resolution of disagreement items is found below.

Committee Recommendations To Resolve Disagreement Items

Based on discussions of public comments, the tribal and Federal sides were able to resolve several disagreement items. Based on those agreements, the Committee made recommendations to the Secretary for resolving the following disagreement items. The section numbers cited below refer to the section numbers in the NPRM. See the Conversion Table for the section numbers in the final rule.

The first area of disagreement resolved is "Eligibility" in subpart B (§ 170.116). The disagreement issue was whether BIA or FHWA should make the determination on new proposed uses of IRR Program funds and the time period for BIA or FHWA to review any submission for a proposed new use. The Federal position was that FHWA approval was required for any new proposed use of IRR Program funds with a 60-day time period for review. The tribal position was that only BIA approval was required and the time for review should be shortened. The compromise, which is reflected in the new section (§ 170.117), requires that tribes send requests for new proposed uses of IRR Program funds only to BIA for approval and send copies of the requests to the FHWA. Also, by agreement of the tribal and Federal sides, we changed the time for review of any proposed new use of IRR Program funds from 60 days to 45 days.

The second area of disagreement resolved is "Updating the IRR TIP" in subpart D (§ 170.420). The issue involved how often Transportation Improvement Plans (TIPs) are updated. The tribal position recommended that updates to the IRR TIP occur on a quarterly basis and that BIA complete the updating process 45 days from date of receipt. The Federal side proposed that BIA submit TIP updates to FHWA on an annual basis only. The matter was resolved by providing clear definitions for and distinctions between an annual IRR TIP update and an IRR TIP amendment and including the time for BIA response. The final rule includes the following provisions: BIA updates

the IRRTP annually so that it can be approved and distributed near the beginning of the fiscal year; at any time during the fiscal year, until July 15, the tribe may request an amendment to its approved IRRTP; and, if BIA receives amendments after July 15, the amendments are incorporated into the following fiscal year IRRTP update. In addition, the final rule includes the following: BIA Regional Offices must now review all information a tribe submits and provide a Regional response within 45 days; and if the proposed TIP amendment includes the addition of a project not listed on the current approved IRRTP, the tribe must submit the proposed amendment to FHWA for approval. The change emphasizes tribes' annually updating the current three-year approved IRRTP, while also allowing tribes to amend IRRTPs throughout the year, if necessary.

The third area of disagreement resolved is "Plans, Specifications, and Estimate (PS&E) Approval Authority" in subpart D (§§ 170.480–481). The tribal and Federal sides disagreed on whether a tribe may assume the review and approval responsibility for PS&Es. During consideration of the public comments the tribal and Federal sides agreed on how to allow tribes to assume the review and approval authority. The final rule reflects the agreement in the PS&E sections by providing that a tribe may review and approve PS&Es for IRR-funded projects under certain circumstances where the function is included in the tribe's self-determination contract or self-governance agreement, or where the tribe is the owner of or is responsible for maintaining the transportation facility. The final rule also provides that for BIA-owned or tribally-owned transportation facilities, a tribe may assume responsibility to review and approve PS&E packages under a self-determination or self-governance agreement if the tribe provides assurances that a licensed professional engineer will review and certify that the PS&Es meet or exceed design health and safety standards referenced in the regulation. Also, an additional licensed professional engineer must perform a second level review at no less than 95 percent completion of the PS&E package. For a facility maintained by a public authority other than BIA or a tribe, in addition to satisfying the requirements set forth above (with limited exceptions), that other public authority will be provided an opportunity to review and approve the PS&E package when it is at least 75

percent, but not more than 95 percent complete.

The fourth area of disagreement resolved is "IRR Construction Project Reports" in subpart D (§§ 170.485–489). The tribal and Federal sides agreed, based on public comments, how to regulate IRR construction project closeouts. The final rule provides clear roles and responsibilities for all affected parties, *i.e.*, the Secretary; the tribe; BIA; and the facility owner, for: project inspection; closeout; audit; acceptance, and, the requirements for each process.

The fifth area of disagreement resolved is "Contents of Rights-of-Way Documents" in subpart D (§§ 170.500–502). The issue is whether 25 CFR part 169 is the appropriate authority for tribal IRR's over Indian lands. While there was some agreement between the tribal and Federal sides on the minimum content required in a right-of-way document, there was disagreement over the applicability of 25 CFR part 169 without appropriate qualifications for tribal IRR's over Indian lands. The tribal and Federal sides agreed, however, that relying on 25 CFR part 169 as the only reference for rights-of-way over Indian lands was not appropriate since tribes are not required to obtain rights-of-way when constructing IRRs across their own reservations. Both sides agreed that new language is necessary to make the distinctions clear about when 25 CFR applies to obtaining rights-of-way. However, adding new language to 25 CFR part 169 requires public notice and comment, and both sides agreed to delete the reference to 25 CFR part 169 in this rule. Therefore, 25 CFR part 169 remains the applicable regulation in certain circumstances for third parties' obtaining rights-of-way across Indian lands, but it is not referenced in the final rule.

The sixth area of disagreement resolved is "Content of Stewardship Agreements" in subpart F (§§ 170.701–705). Because the tribal and Federal sides agreed to revise the sections on PS&E package approval in the final rule, the sections on Stewardship Agreements are no longer applicable and we have deleted them.

Areas of Disagreement With No Committee Recommendation

The Committee was not able to resolve the key area of disagreement, "General Issues" in subpart A in the NPRM. The disagreement on availability of funds between the tribal and Federal sides on this subject is an issue of statutory interpretation. The tribal side's position is that TEA–21 requires that all IRR Program funds be made available under the requirements of the Indian

Self-Determination and Education Assistance Act (ISDEAA). The Federal version is that under TEA–21, specifically section 1115(b) not all funds are required to be made available, but all funds that are made available must be made available in accordance with the requirements of ISDEAA. Many commenters supported the tribal view, however, the tribal and Federal Committee members were not able to resolve the disagreement over statutory interpretation. We have retained the Federal questions and answers for this item.

One of the key areas of disagreement, "Self-Governance Compacts" in subpart H was not resolved after consideration of the comments. The disagreement centers around the right to assume individual projects or, alternatively, an entire program comprised of individual projects. Commingled in this issue of disagreement are issues of the 6 percent Program Management and Oversight (PM&O) funding and issues of using project funds for Federal responsibilities. The authority for the 6 percent PM&O funding is the language in the annual DOI Appropriations Act. The authority for using project funds for Federal project responsibilities is ISDEAA language which mandates that the Secretary must assure health and safety in all projects. For the latter, the Federal side's position is that certain requirements apply to projects individually regardless of whether one or more projects are assumed collectively as a program. Thus, the tribal side's approach of eliminating Federal access to project funds to carry out project responsibilities would jeopardize the Federal Government's obligation to assure health and safety for individual construction projects. In addition, the tribal side's view would eliminate the Secretary's statutory right to use the 6 percent Program Management and Oversight funding, as needed. In other words, whether projects are assumed individually or collectively, the Federal side interprets ISDEAA as requiring the Secretary to assure health and safety for all construction. Many commenters supported the tribal view, but none presented a legal right to ignore the Secretary's discretion to use up to 6 percent of Program Management and Oversight funding or to ignore the Secretary's right to use project funds to carry out the Secretary's health and safety responsibilities under ISDEAA. Therefore, in the final rule we have retained the Federal questions and answers for this item.

Another key area of disagreement that was not resolved was "Arbitration

Provisions” in subpart H (§§ 170.941–952). Essentially, the tribal side elects to choose Alternative Dispute Resolution (ADR) procedures at their option. The Federal version is that ISDEAA and its implementing regulations for Indian self-determination contracts and self-governance agreements require that certain dispute procedures be utilized, but that ADR may be used only when both parties agree. For example, the Contract Disputes Act (CDA) is incorporated into ISDEAA and requires its own procedures once a contract or agreement is executed. While ADR may be used as an alternative, it is only appropriate when both parties agree. The tribal position would allow ADR unilaterally and solely at the tribe’s option. Thus, with the tribal side’s approach, a dispute could remain perpetually unresolved or as long as the tribe chooses. Many comments supported the tribal view, however, no commenters presented a legal basis to depart from the requirements of ISDEAA. We resolved this disagreement by retaining the Federal questions and answers for this item, with a modification. The modification adds “for non-construction activities” to § 170.941(c) to make clear that the Model Contract section of ISDEAA does not apply to construction activities.

Areas of Disagreement That Are Outside the Scope of Rulemaking

The Department found four of the Key Areas of Disagreement, “Advance Funding” in subpart E (§§ 170.614–618), “Contractibility and Compactibility of TEA–21 Programs” in subpart E (§§ 170.600–636), “Availability of Contract Support Funding” in subpart E (§§ 170.635–636), and “Savings” in subpart E (§ 170.620) to be outside the scope of this rulemaking. The discussion of these areas was included in the NPRM Preamble, however, so that the public would be aware of the Committee’s discussions on these areas. We made no changes to the questions and answers pertaining to these issues in the NPRM.

Discussion of Public Comments

The discussion of comments below is keyed to specific sections of the NPRM, including subparts and subheadings. Only major, substantive public comments are discussed below. In some instances, several commenters are represented as one comment—having made similar or identical comments. Grammatical changes, minor wording revisions, and other purely style-oriented comments are not discussed; however, changes to the final rule reflect such public comments. The

section number references are to the final rule.

Subpart A—Policies, Applicability, and Definitions

Comment: Change the term “tribal contractor” to “tribal government” as this is a more appropriate term with respect to Indian self-determination and tribal self-governance.

Response: A change throughout the final rule has been made to refer to “Indian tribe or tribal organization” rather than tribal contractor, where applicable, for consistency with the Indian Self-Determination and Education Assistance Act (ISDEAA).

Comment: Language should be included that would indicate that tribes be included in the development of policies, consistent with Federal rules and regulations.

Response: Language was added to indicate that the development of policies would be “in consultation with Indian tribes.”

Comment: The rule should indicate that where different from ISDEAA, the IRR Program regulations should serve to advance—rather than retard—the Federal Government’s policy of increasing tribal autonomy and discretion of this program.

Response: Language has been added that “Where this part differs from provisions in the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), this part should advance the policy of increasing tribal autonomy and discretion in program operation.” (§ 170.2(b))

Comment: Tribes should only have to follow those IRR Program Policy and Guidance manuals and directives which are consistent with the regulations in this part and 25 CFR parts 900 and 1000. Tribes should not have to abide by any unpublished requirements, guidelines, manuals, or policy directives of the Secretary, unless otherwise required by law.

Response: This change was made and is reflected in § 170.3.

Comment: Delete the term “Act” and refer only to the Indian Self-Determination and Education Act (ISDEAA).

Response: Reference is made to ISDEAA and “Act” is removed from the text of the rule.

Comment: Delete the term “Compact” and refer instead to “self-governance agreement.”

Response: Reference is made to “self-governance agreement” only and the term “compact” is deleted.

Comment: In the definition of the term “construction,” delete “highway”

and add “IRR Program transportation facility.”

Response: The reference to “highway” was changed to “IRR Program transportation facility.”

Comment: A construction contract is not a project. The term “Construction Contract” should be rewritten by inserting “contract for a” and deleting “or” after “self-determination.” Items (1), (2) and (3) are inaccurate and unneeded.

Response: Under ISDEAA a construction contract is defined as a project. “Contract for a” was added and “or” was deleted after “self-determination.” Items (1), (2) and (3) remain in the rule to clarify restrictions. (§ 170.5)

Comment: Delete the term “Contract” since this is unnecessary when all types of contracts are otherwise explained by reference and within the context of the rule.

Response: “Or a procurement document issued under Federal or tribal procurement acquisition regulations” was added to the definition of “Contract.” (§ 170.5)

Comment: The term “governmental subdivision of a tribe” should be clearly (and narrowly) defined.

Response: The term “governmental subdivision of a tribe” is added and defined to be “the unit of a federally-recognized tribe which is authorized to participate in the IRR Program activity on behalf of the tribe.” (§ 170.5)

Comment: Add the term “Indian Reservation Road (IRR)” to the definitions section.

Response: The term “Indian Reservation Road (IRR),” as it is defined under 23 U.S.C. 101(a), has been added to the definitions section. (§ 170.5)

Comment: Add the term “IRR Program Management Funds” to the definitions section.

Response: The term “IRR Program Management and Oversight Funds” has been added to the definitions in subpart A, § 170.5 to mean “those funds authorized by Congress in the annual appropriations acts to pay the cost of performing IRR Program management activities.”

Comment: Delete the reference to “up to 2 percent planning funds” and substitute a reference to planning funds authorized under 23 U.S.C. 204(j) to cover any future legislative language.

Response: The reference to planning funds authorized under 23 U.S.C. 204(j) or “tribal transportation planning funds” was substituted. “Tribal transportation planning funds” is defined in subpart A, § 170.5.

Comment: Within the term “Rehabilitation,” reference should be

made to all work, rather than just to major work. Rehabilitation is not confined only to bridge work.

Response: The term “Rehabilitation” references transportation facilities, rather than only bridges, and does not refer only to major work. (§ 170.5)

Comment: The term “Transportation Improvement Program (TIP)” should be better defined.

Response: The term “TIP” has been deleted and the definitions of TTIP, IRR TIP, and STIP are included in the definitions in subpart A, § 170.5.

Subpart B—Indian Reservation Roads Program Policy and Eligibility

Consultation, Collaboration, Coordination

Comment: Properly identify the Community Development Administration funds as being “USDA Rural Development” funds and reference the appropriate authority under the “Federal Transit Administration.”

Response: These references were made in the final rule. (§ 170.105)

Comment: The rule should spell out the obligations of the States, MPOs, RPOs, and local governments to consult with tribes about planning for tribal transportation projects, including regionally significant projects.

Response: No change was made to the final rule as the obligations of these parties are clearly referenced in 23 U.S.C. and are incumbent upon all parties dealing with tribal transportation projects.

Eligible Uses of IRR Program Funds

Comment: Appendix A to subpart B should reflect the use of indirect cost in relation to non-construction administrative functions and equipment purchases in relation to administering the IRR Program generally.

Response: The section was revised by adding “other eligible activities described in this part” to A.37 and B.67 in appendix A to subpart B and adding “or in this part” to the end of § 170.116(f).

Comment: Provisions for cyclical maintenance activities should be clarified and reference to appropriate work under this activity should be illustrated.

Response: The rule has been changed to reflect “routine maintenance” and reference to “patching or marking pavement,” and “bridge joints, drainage, and other work” has been deleted in its entirety because maintaining bridge joints is an eligible activity and drainage is included in appurtenances. (§ 170.116) Eligible activities are

adequately explained in appendix A to subpart B.

Comment: Under ISDEAA only BIA, not FHWA, may determine the eligibility for a tribe’s proposed new use of IRR Program funds.

Response: The rule reflects that BIA will approve requests for new proposed uses of IRR Program funds for activities eligible under 25 U.S.C. and FHWA approves requests for new proposed uses of IRR Program funds for activities eligible under 23 U.S.C.

Comment: Approvals for new proposed uses should be completed in a more timely fashion—a response time of 45 days is recommended.

Response: The time line for written responses has been changed in the rule from 60 days to 45 days. (§ 170.117)

Comment: Include construction of public roads to BIA schools as an eligible activity.

Response: Eligibility of construction of public roads accessing public schools is already included in the list of allowable uses of IRR Program funds in appendix A of subpart B.

Use of IRR and Cultural Access Roads

Comment: Under Civil Justice Reform (Executive Order 12988), concern was raised with a tribe’s ability to close a cultural access road. Further, under the Regulatory Flexibility Act, concern was raised about the many other non-Indian landowners served by tribally-owned roads who may be impacted by this rule.

Response: Section 170.120 is revised to reflect that IRR’s must be open and available for public use.

Comment: IRRs must be open and available to public use because they are funded with public funds.

Response: The term “generally” was deleted from the answer. (§ 170.120)

IRR Housing Access Roads

Comment: Define the terms “housing cluster” and “Indian community.”

Response: A definition for “housing cluster” was added as follows: “Housing cluster means three or more existing or proposed housing units.” § 170.127(c) The term “Indian community” was deleted because a housing cluster is necessarily part of an Indian community. “On public rights-of-way” was also added after “housing streets” in § 170.128 in order to make the answer consistent with § 170.127(a) which references “public road.”

Toll, Ferry and Airport Facilities

Comment: Clarify that a tribe operating the IRR Program under ISDEAA may use 100 percent of IRR Program funds to provide for the local match.

Response: In the final rule, the question relating to this issue was changed to reflect the use of IRR Program funds to provide for the local match. (§ 170.130)

Recreation, Tourism, and Trails

Comment: Clarification should be made that tribes may use IRR Program funds for recreation, tourism, and trails.

Response: The clarification that tribes, tribal organizations, tribal consortiums, and BIA may use the funds has been made in the final rule. (§ 170.135).

Highway Safety Functions

Comment: Separate references should be made to (1) Highway Safety Programs and (2) IRR Programs to be consistent with the remaining list of Federal programs under which funds may be available for a tribe’s highway safety programs and reference other funding Congress may authorize and appropriate.

Response: The final rule reflects the separate references and references other funding from Congress. (§ 170.141)

Subpart C—Indian Reservation Roads Program Funding

Tribal Transportation Allocation Methodology (TTAM)

Comment: Clarify takedowns and the order in which they are incorporated.

Response: The TTAM diagram was revised for clarification, the descriptions made more concise, and the process better defined. (§ 170.200)

IRR High Priority Project (IRRHPP)

Comment: What activities cannot be funded with the IRRHPP?

Response: The final rule identifies activities that cannot be funded with the IRRHPP. (§ 170.205(c))

Comment: Clarify what constitutes an emergency/disaster.

Response: Clarifications of emergency/disaster have been made. (§ 170.206)

Comment: How are IRRHPP applications ranked?

Response: Ranking clarifications were made in the final rule. (§ 170.209)

Comment: How are unspent funds handled?

Response: The final rule now states that upon completion of an IRRHPP, funds that are reserved but not expended are to be recovered and returned to the IRRHPP funding pool. (§ 170.213)

Comment: The schedule for IRRHPP proposals should be changed due to concerns about the lack of time to get projects awarded and underway.

Response: The final rule reflects the schedule change. (§ 170.212)

Population Adjustment Factor

Comment: The rule should better define the data used for PAF.

Response: The final rule provides that the population figures are those defined in § 170.220.

Relative Need Distribution Factor

Note: Most of the sections on the RNDF were placed into appendix C to subpart C.

Appendix C to Subpart C

Comment: Use of population figures developed under the Native American Housing Assistance and Self-Determination Act (NAHASDA) should not be qualified as “interim” and there should be a clarification that the American Indian and Alaska Native Service Population NAHASDA population figures will be used.

Response: The reference to “interim” was deleted and the clarification was made. (Appendix C to subpart C)

Comment: Is there a limit on how many proposed roads can be added to the inventory?

Response: The final rule reflects that there is no limit.

Comment: What is the definition of a proposed road and under what conditions can it be added to the inventory?

Response: The definition of a proposed road is included in § 170.5 and how it is added to the inventory is provided in § 170.443.

Comment: The designation of a road should reference that the national IRR Program bid tabulation data will be collected and input into the Cost-to-Construct database by BIADOT.

Response: This reference was made in the final rule. (Appendix C to subpart C)

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

Transportation Planning

Comment: Re-order the sections in a sequential order.

Response: The sections were re-ordered, beginning with transportation planning through approval of the IRR TIP and providing documentation to States for inclusion in planning documents.

Comment: Tribes may perform certain aspects of transportation planning under ISDEAA and BIA must perform certain aspects.

Response: Those aspects of transportation planning that either a tribe or BIA must perform and aspects that either BIA or a tribe may perform have been clearly identified in the final rule. (§§ 170.401–402)

Comment: Remove references to Regional Planning Organizations (RPOs) and Metropolitan Planning Offices (MPOs) as they may give the misconception that this rule creates rural planning offices.

Response: The use of RPO and MPO was clarified to eliminate the misconception that “Rural Planning Offices” were being created. “Other appropriate planning authorities” was included in addition to States and their political subdivisions.

Transportation Improvement Program

Comment: BIA should update IRR TIPs quarterly.

Response: The provision for annual updates was retained in the final rule; however, the final rule provides that a tribe may request an amendment to the approved IRR TIP until July 15 of each year. (§§ 170.425 and 170.427)

Comment: BIA should review proposed changes to an approved IRR TIP within 45 days of receipt.

Response: BIA will review and respond to amendments within 45 days of receipt. (§ 170.427)

Comment: The requirement for, development of, and uses of a long-range transportation plan (LRTP) should be clarified and redundancies within the sections eliminated.

Response: The final rule makes these clarifications through the use of new questions and answers. Clarification of what comprises the LRTP has been made to include only the health and safety concerns relating to the transportation improvements; the inclusion of additional methods for public involvement in the development of the LRTP in allowing the tribe or BIA to post notices in accordance with local practice; clarifications to illustrate the requirements of a properly convened public meeting and its statutory notice. In addition, the requirement for the use of a consultant to approve the tribal LRTP has been deleted.

Public Hearings

Comment: Clarify how BIA or a tribe determines the need for a public hearing and what funds are available for the hearing.

Response: The final rule clarifies how the need for a public hearing is determined and what funds are available. (§§ 170.435–436)

Comment: When a public meeting is held, a courtesy copy of the notice should be provided to the affected tribe and/or the BIA Regional Office.

Response: This recommendation has been accepted in the final rule. (§ 170.438)

Comment: Environmental and/or archaeological clearances should be included in the public hearing process.

Response: These clearances are referenced in the final rule. (§ 170.439)

Comment: Are there any distinctions in funding for funding public hearings for IRR planning and funding for public hearings for projects?

Response: Transportation planning public hearings are funded by tribal transportation planning funds or IRR Program construction funds and project public hearings are funded by construction funds. (§ 170.436)

Comment: Clarifications need to be made with respect to when the public must be notified before project activities begin and the responsibility BIA and/or the tribe must bear to provide such notice.

Response: The final rule clarifies public notice requirements for both the tribe and BIA. (§§ 170.438–441)

IRR Inventory

Comment: Move sections on technical aspects of the inventory from subpart C to subpart D.

Response: The sections were moved from subpart C to subpart D.

Comment: References to Atlas maps and functional classifications are not required, too technical, and not important to the intent of this section.

Response: These references have been deleted.

Comment: The IRR inventory is a comprehensive database—not a list of information.

Response: The final rule indicates that the inventory is a comprehensive database. (§§ 170.5 and 170.442)

Comment: Delete the section relating to the accuracy of the database because it addressed only roads and was not relevant to other transportation facilities.

Response: The section was deleted.

Comment: The surface type section is only for coding purposes in the inventory and should be removed from this section.

Response: The surface type section has been removed.

Comment: It should be made clear that the IRR Inventory is used for other purposes in addition to the Relative Need Distribution Factor.

Response: The use of the IRR inventory has been clarified. (§ 170.442)

Comment: The section regarding “accuracy provisions” for all eligible transportation facilities is confusing and adds nothing substantive to the understanding of eligible transportation facilities. Recommend deleting this section.

Response: This section was deleted in its entirety.

Comment: The functional classification system categories used by the States and those used in the IRR Program should be consistent.

Response: We have included the complete definitions that meet the simplified approach in appendix C of subpart C. Therefore, we have deleted this section and all other sections related to functional classification and surface type in subpart D.

Review and Approval of Plans, Specifications, and Estimates (PS&Es)

Comment: Tribes should be able to assume review and approval authority for PS&Es for IRR-funded projects under a self-determination contract or a self-governance agreement.

Response: We have created a new subheading, *Review and Approval of Plans, Specifications, and Estimates*. The final rule includes provisions that a tribe may perform this task where the function is included in the tribe's self-determination contract or self-governance agreement, or where the tribe is the owner of or is responsible for maintaining the transportation facility. In addition, for BIA-owned or tribally-owned transportation facilities, a tribe may assume responsibility to review and approve PS&E packages under a self-determination contract or self-governance agreement so long as a tribe provides assurances that a licensed professional engineer will review and certify that the PS&Es meet or exceed design, health and safety standards referenced in these regulations. For a facility maintained by a public authority other than BIA or a tribe, a tribe must satisfy these requirements and provide the public authority an opportunity to review and approve PS&E packages. The final rule reflects the tribes' ability to ensure health and safety, inclusion of health and safety standards in self-determination contracts and self-governance agreements, and appropriate coordination with relevant authorities in the approval process. (§§ 170.460–463)

Comment: Some items listed as part of a PS&E package are supplemental, are not part of the package, and should be deleted.

Response: The final rule states which items are supplemental to a PS&E package. (§ 170.460)

Construction and Construction Monitoring [and Rights-of-Way]

Comment: Delete “where feasible” and replace “consultation” with “coordination.”

Response: In the final rule “where feasible” was deleted and

“coordination” was substituted for “consultation.” (§ 170.471)

Comment: References to 25 CFR part 169, “rights-of-way,” pertain to third parties and not to tribes building IRRs on their reservations.

Response: References to “Rights-of-Way” have been removed from the final rule although 25 CFR part 169 remains the authority for third parties on Indian lands.

Comment: Who has final acceptance responsibility of the IRR Construction Project Report?

Response: In the rewrite of the project closeout and audits sections (which have been combined), we indicate that the facility owner has final acceptance on the project and report. (§ 170.473)

Appendix A to Subpart D

Comment: This Appendix should be characterized to acknowledge the IRR Program's responsibilities to effectively manage a broad range of cultural resources of which archaeological resources are only a part.

Response: The Appendix has been retitled as “Cultural Resource and Environmental Requirements for the IRR Program.”

Comment: Reference should be made to other implementing regulations, *e.g.*, the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the Archaeological Resource Protection Act.

Response: We have added “other applicable Federal laws and regulations” to encompass these (and other) implementing regulations, as appropriate.

Appendix B to Subpart D

Comment: Add “AASHTO Guidelines of Geometric Design of Very Low-Volume Local Roads” to the list of Design Standards for the IRR Program.

Response: This reference has been added to appendix B to subpart D.

Subpart E—Service Delivery for Indian Reservation Roads

Funding Process

Comment: The term “TTAM” should replace “IRR Relative Need Formula” to be consistent with subpart C.

Response: The term “TTAM” has been appropriately referenced in this subpart.

Comment: Publishing a notice of availability of funds in the **Federal Register** is an undue burden on the Federal Government and presents conflicts with other time lines in this rule.

Response: We have revised this responsibility in the final rule by

separating items BIA will publish in the **Federal Register** and the items that regional offices will provide to tribes upon publication of the notice of availability of funds. This will allow BIA to publish the amount of funding available in a manner that does not conflict with other time lines established in this rule and reduces the administrative burden. (§ 170.600)

Miscellaneous Provisions

Comment: Add a provision for consulting with a tribe before using a force account even after a tribe declines a self-determination contract or self-governance agreement.

Response: Because divulging bidding information is contrary to the Federal procurement regulations, we simply added more complete information about force accounts in the final rule. (§ 170.605)

Contracts and Agreements Under ISDEAA

Comment: What protections are there if the tribe fails to substantially perform the contracted work?

Response: We have clarified the final rule to indicate the sanctions (and protections) available when a tribe fails to substantially perform the contracted work. (§ 170.621)

Subpart F—Program Oversight and Accountability

Comment: Some sections of this subpart should be removed because they more appropriately deal with PS&Es and not program stewardship.

Response: The section on PS&Es has been revised to include the concerns that were referenced in this subpart. Consequently, their reference has been deleted from subpart F.

Subpart G—BIA Road Maintenance

Comment: Change the term “Motorized Trails” to “vehicle trails.”

Response: We have changed the reference to “motorized vehicle trails.” (§ 170.803)

Comment: Include a provision that the Secretary provide to the affected tribe a draft copy of the findings that an IRR transportation facility is not being maintained due to insufficient funding prior to providing the report to Congress under 23 U.S.C. 204.

Response: The final rule provides that if BIA determines that an IRR transportation facility is not being maintained under IRR TFMMS standards due to insufficient funding, under 23 U.S.C. 204, BIA must continue to request annual funding for road maintenance programs on Indian reservations. (§ 170.811). In addition,

the report is provided to the Secretary of Transportation not to Congress.

Comment: The circumstances surrounding a temporary closure of or restricted access to an IRR transportation facility should be clarified to include private landowners in the decision-making process.

Response: The final rule includes consultation with applicable private landowners in addition to the tribe and also indicates that consultation is not required whenever the conditions involve immediate safety and life-threatening situations. (§ 170.813)

Comment: Include provisions “including runway lighting” and “boat ramps.”

Response: These references have been added to the final rule. (§ 170.803)

Comment: Provision should be made for catastrophic failure or natural disaster.

Response: These provisions have been added to the final rule in discussion of the circumstances when closure of an IRR transportation facility is warranted. (§ 170.813)

Comment: Recommended deleting from the answer the remainder of the sentence after the words “local governments” in § 170.822.

Response: The entire section was deleted.

Comment: Recommended moving §§ 170.816–820 on bridge inspections from subpart G to subpart D since bridge inspections are funded from the IRR Program rather than the Road Maintenance Program.

Response: The sections on bridge inspections have been moved to Subpart D for clarity. We added a subheading for IRR bridge inspections under subpart D. (§§ 170.504–507)

Subpart H—Miscellaneous

Tribal Transportation Departments

Comment: Noted that the provision in § 170.932 conflicts with a U.S. Supreme Court decision.

Response: The section has been modified to reflect recent Federal case decisions.

Comment: Switch the order of § 170.938 and § 170.939 for clarity.

Response: These sections are now § 170.931 and § 170.932. We also added “see appendix A, subpart B” after “activities” in § 170.931.

Comment: It should be made clear that IRR Program funds can be used for transportation planning and administration.

Response: This clarification has been made in the final rule. (§ 170.931)

Resolving Disputes

Comment: The tribes should have the option of choosing the Alternative Dispute Resolution Act (ADR) to settle disputes arising out of their self-determination contracts or self-governance agreements.

Response: The Contract Disputes Act is incorporated by reference into ISDEAA and applies to disputes after contracts or agreements are awarded. We clarified that the Contract Disputes Act is available for dispute resolution techniques or procedures for construction and the Model Contract is available for non-construction by moving “and the implementing regulations” from the end of the sentence to follow “ISDEAA” and noting that “non-construction activities” applies only to the Model Contract. However, for non-construction activities under the Model Contract, alternative dispute resolution options are available—including the ADR. Section 170.934 was revised because it was ambiguous as written.

II. Summary of Regulations

Subpart A—Policies, Applicability, 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 and this subpart provides interpretation of the language used throughout 23 U.S.C.

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 and 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 both the eligible and non-eligible activities for IRR Program 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;

- Covers the highway safety aspects of the IRR Program and those activities, functions, and equipment that may be eligible for funding under this program;
- In addition, 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 the Relative Need Distribution Factor used to distribute IRR Program funds, including:

- An overview of the allocation of IRR Program Funds;
- The Transportation Planning Program (under 23 U.S.C. 204(j));
- The Relative Need Distribution Factor for IRR Construction;
- The IRR High Priority Projects Program (IRRHPP); and
- The Population Adjustment Factor (PAF).

It also 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;
- The 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;
- Funding sources for transportation planning;
- The requirements for developing a Transportation Improvement Program and Long-Range Transportation Plans including the requirements for public hearings and input into their development.

This subpart also:

- Defines the IRR inventory, its components, and how it is developed and used;
- Includes the environmental and archaeological requirements applicable to projects under this program and whether IRR Program funds can be used for these requirements;
- Outlines design, construction, and construction monitoring standards;

- Includes closeout procedures for IRR Program construction projects and identifies the roles of and the responsible entities for such procedures;

- Discusses the processes and procedures used at the various office levels of the IRR Program to ensure that the program is being carried under these regulations and the governing laws; and
- Outlines the management systems that BIA must develop and maintain for oversight and management of the IRR Program.

Subpart E—Service Delivery for Indian Reservation Roads

This subpart tells how 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.

This subpart also covers:

- Indian preference versus local preference in contracting;
- Contract enforcement;
- The applicability of the Buy Indian Act and the Buy American Act to the IRR Program;
- The 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 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; and
- Program accountability.

Subpart G—BIA Road Maintenance

This subpart covers:

- BIA Transportation Facility Maintenance Program and its eligible activities and facilities including roads, bridges, airports, and others;
- Maintenance funding;
- Facility ownership;
- Maintenance responsibilities to the traveling public;
- Maintenance management system requirements;

- Maintenance standards;
- Mandated bridge inspection requirements and standards; and
- Provisions for emergency maintenance.

Subpart H—Miscellaneous

This subpart provides information on:

- The transport of hazardous and nuclear waste;
- Indian preference and tribal employment rights;
- The applicability of tribal taxes and fees for IRR Projects;
- The Emergency Relief Program;
- Establishing and operating tribal transportation departments and the eligible activities and/or functions for which these organizations can contract;
- Tribal regulations of oversize and overweight vehicles;
- Reporting requirements;
- Tribal employment rights;
- Alternative dispute resolution procedures to resolve IRR program disputes; and
- Research activities available under the IRR Program.

III. Procedural Requirements

A. Regulatory Planning and Review (Executive Order 12866)

This final rule is a significant regulatory action requiring review by the Office of Management and Budget. The Office of Management and Budget has reviewed this final rule under Executive Order 12866. This final rule will have budgetary effects of entitlement, grants, user fees, or loan programs or the rights or obligations of their recipients. Funding for the IRR Program in fiscal year 2003 is \$275 million and is expected to increase in future years. It is anticipated that the IRR Program will receive more than \$2 billion dollars over the next six years with the passage of a new Transportation authorization. The DOT, FHWA, allocates funds to DOI, BIA. BIA distributes the funds to each of its 12 regions based on the existing funding formula for the benefit of tribes in each region. This final 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 final rule enables Indian tribes to be more directly involved in the care, upgrade, safety, and improvement of their transportation facilities. This rule sets forth policies and guidelines under which FHWA, BIA, and tribes that contract with BIA conduct the IRR Program. It also includes 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 final 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, Pub. L. 93–638, and under the Transportation Equity Act for the 21st Century, Pub. L. 105–178, as they relate to the IRR Program which has been in effect since 1983.

B. Regulatory Flexibility Act

DOI 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 final 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 Program funds is approximately \$275 million.

This final 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 final 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 final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This final 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 final rule does not have significant takings implications. This final rule does not pertain to taking of

private property interests, nor does it impact private property.

F. Federalism (Executive Order 12612)

This final 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 final 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 rulemaking requires an information collection from 10 or more parties and a submission under the Paperwork Reduction Act of 1995, Pub. L. 104–13, is required. Accordingly, The Department prepared an OMB form 83–I for review and approval by OMB. Having reviewed the submissions of the Department with respect to the burden hours of each part of this rulemaking, along with any comments that were submitted by the reviewing public, OMB has approved the information collection requirements contained in this rulemaking and has assigned OMB control number 1076–0161. The expiration date of this control number is October 31, 2005. This approval by OMB was necessitated by the requirements inherent in the revisions to 25 CFR part 170. Revisions to part 170 are in furtherance of a Departmental initiative to implement the Transportation Equity Act for the 21st

Century (TEA–21) and set policies and procedures governing the IRR Program. The information provided through information collection requirements is used by DOI, BIA, to determine how funds appropriated by Congress under TEA–21 will be allocated to various tribal governments in implementing the IRR program. The information is particularly used in assisting tribal governments to meet reporting and application requirements for their participation in the IRR program, and is reflected in subparts C or D of this rulemaking. The total estimated burden hours for this information collection is 31,470 hours and is required to obtain or retain a benefit under 25 CFR part 170 pursuant to 5 CFR 1320.9. The public is invited to make any additional comments it may have concerning the accuracy of this burden estimate and any suggestions for reducing such burden.

I. National Environmental Policy Act

DOI 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 process of developing this rule through negotiated rulemaking. 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 newsletters and other mailings, provided updates at intertribal and other Indian Reservation Roads transportation-related meetings, and sent periodic letters to tribal leaders. As part of the negotiated rulemaking process with tribes, we reviewed and considered public comments to the NPRM with the Negotiated Rulemaking Committee to make recommendations to the Secretary for the final rule. We have evaluated any potential effects on federally-recognized Indian tribes and have determined that there are no potential adverse effects. The final rule expands tribal participation in and responsibilities for various transportation-related activities of the IRR program. We consulted with tribal governments and tribal organizations as part of the negotiated rulemaking process throughout the comment period after publication of this final rule.

IV. Reference Tables

The following tables are provided to allow the reader to locate specific matters of interest under particular subheadings from the NPRM and determine if those sections have been relocated in the final rule.

NPRM subpart	NPRM subheading	NPRM section Nos.
Subpart A	General Provisions and Definitions	§ 170.1–§ 170.6
Subpart B	Indian Reservation Roads Program Policy and Eligibility.	
	Consultation, Collaboration, Coordination	§ 170.100–§ 170.112
	Eligibility for IRR Funding	§ 170.114–§ 170.116
	Use of IRR and Cultural Access Roads	§ 170.120–§ 170.126
	Seasonal Transportation Routes	§ 170.130–§ 170.138
	IRR Housing Access and Toll Roads	§ 170.140–§ 170.148
	Recreation, Tourism, Trails	§ 170.150–§ 170.154
	Highway Safety Functions	§ 170.155–§ 170.159
	Non-Road Transportation	§ 170.160–§ 170.162
	Transit Facilities	§ 170.163–§ 170.170
	IRR Program Coordinating Committee	§ 170.171–§ 170.177
	Indian Local Technical Assistance Program (LTAP)	§ 170.178–§ 170.192
	LTAP Sponsored Education and Training Opportunities	§ 170.193–§ 170.194
Subpart C	Indian Reservation Roads Program Funding	§ 170.225–§ 170.232
	Tribal Transportation Allocation Methodology for IRR Construction	§ 170.235–§ 170.236
	IRR High Priority Projects (IRRHPP)	§ 170.245–§ 170.257
	Population Adjustment Factor (PAF)	§ 170.263–§ 170.267
	Relative Need Distribution Factor	§ 170.270–§ 170.282
	General Data Appeals	§ 170.285–§ 170.288
	IRR Inventory and Long-Range Transportation Planning (LRTP)	§ 170.290–§ 170.299
	Long-Range Transportation Planning	§ 170.300–§ 170.303
	Flexible Financing	§ 170.350–§ 170.357
Subpart D	Planning, Design, and Construction of Indian Reservation Roads Program Facilities.	
	Transportation Planning	§ 170.400–§ 170.436

NPRM subpart	NPRM subheading	NPRM section Nos.
	Public Hearings	§ 170.437–§ 170.445
	IRR Inventory	§ 170.446–§ 170.460
	Environment and Archeology	§ 170.461–§ 170.462
	Design	§ 170.464–§ 170.469
	Construction and Construction Monitoring and Rights-of-Way	§ 170.472–§ 170.502
	Program Reviews and Management Systems	§ 170.510–§ 170.516
Subpart E	Service Delivery for Indian Reservation Roads	§ 170.600–§ 170.636
Subpart F	Program Oversight and Accountability	§ 170.700–§ 170.708
Subpart G	BIA Road Maintenance	§ 170.800–§ 170.823
Subpart H	Miscellaneous.	
	Hazardous and Nuclear Waste Transportation	§ 170.900–§ 170.907
	Reporting Requirements and Indian Preference	§ 170.910–§ 170.923
	Emergency Relief	§ 170.924–§ 170.932
	Tribal Transportation Departments	§ 170.936–§ 170.940
	Arbitration Provisions	§ 170.941–§ 170.943
	Other Miscellaneous Provisions	§ 170.950–§ 170.952

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NPRM		Final	NPRM		Final	NPRM		Final	NPRM		Final	NPRM		Final	NPRM		Final	NPRM		Final	NPRM		Final
.1	-	.145	.130	.185	.167	.276	App C	.410	.403	.449	.443	.491	.474	.630	.625	.823	.813						
.2	.1	.146	.130	.186	.168	.278	App C	.411	.5	.450	.443	.500	-	.631	.626	.900	.900						
.3	.2	.147	.130	.187	.169	.279	App C	.412	.422	.451	-	.501	-	.632	.624	.901	.901						
.4	.3	.148	.131	.188	.170	.282	App C	.413	.421	.452	-	.502	-	.633	.622	.902	.902						
.5	.4	.150	.135	.189	.170	.285	.231	.414	.422	.453	.445	.510	.500	.634	.623	.903	.903						
.6	.5	.151	.136	.190	.171	.286	.231	.415	.424	.454	-	.511	.500	.635	.607	.904	.904						
.100	.100	.152	.135	.191	.164	.287	.231	.416	.415	.455	.445	.512	.500	.636	.608	.905	.905						
.101	.101	.153	.137	.192	.170	.288	.232	.417	.423	.456	-	.513	.501	.700	.700	.906	.906						
.102	.102	.154	.138	.193	.175	.290	.227	.418	.420	.457	-	.514	.502	.701	-	.907	.906						
.103	.103	.155	.141	.194	.176	.291	.227	.419	.426	.458	-	.515	.503	.702	-	.910	.910						
.104	.103	.156	.142	.225	.200	.292	.228	.420	.426	.459	-	.516	-	.703	-	.915	.911						
.105	.104	.157	.143	.226	.200	.294	.226	.421	.429	.460	.443	.600	.610	.704	-	.916	.911						
.106	.105	.158	.144	.232	.201	.295	.227	.422	.428	.461	.450	.601	A to E	.705	.462	.918	.912						
.107	.106	.159	.145	.235	.200	.296	.444	.423	.428	.462	.451	.602	.612	.706	.701	.919	.913						
.108	.107	.160	.132	.236	.202	.297	.227	.424	.425	.464	.454	.603	.610	.707	.462	.920	.914						
.109	.109	.161	.132	.245	.205	.298	.227	.425	.425	.465	.454	.604	.613	.708	.462	.921	.915						
.110	.110	.162	.132	.246	.206	.299	.157	.426	.427	.466	.455	.605	.601	.800	.5	.922	.916						
.111	.111	.163	.5	.247	.208	.300	.225	.427	.410	.467	.456	.606	.601	.801	.800	.923	.917						
.112	.101	.164	.148	.248	.209	.301	.410	.428	.411	.468	.457	.608	.610	.802	.804	.924	.920						
.114	.115	.165	.150	.249	.209	.302	.411	.429	.410	.469	.456	.609	.611	.803	.802	.925	.921						
.115	.116	.166	.149	.250	.212	.303	.228	.430	.413	.472	.454	.610	.600	.804	.801	.926	.922						
.116	.117	.167	.150	.251	.210	.350	.300	.431	.412	.473	.470	.611	.614	.805	.803	.927	.923						
.120	.120	.168	.151	.252	.210	.351	.300	.432	.414	.474	.470	.612	.611	.806	.810	.928	.923						
.121	.121	.169	.152	.253	.205	.352	.300	.433	.426	.475	.471	.613	.615	.807	.805	.929	.924						
.122	.121	.170	.151	.254	.209	.353	.300	.434	.428	.476	.471	.614	.611	.808	.801	.930	.925						
.123	.121	.171	.155	.255	.211	.354	.301	.435	.425	.477	.471	.615	.611	.809	.806	.931	.926						
.124	.121	.172	.155	.256	.212	.355	.302	.436	.427	.478	.471	.616	.611	.810	.807	.932	.927						
.125	.122	.173	.156	.257	.214	.356	.301	.437	.413	.479	.472	.617	.611	.811	.808	.936	.930						
.126	.121	.174	.158	.263	.220	.357	.303	.438	.435	.480	.461	.618	.616	.812	.809	.937	.930						
.130	.123	.175	.158	.264	.220	.400	.400	.439	.436	.481	.462	.619	.617	.813	.810	.938	.932						
.135	.124	.176	.158	.265	.221	.401	.401	.440	.435	.482	.471	.620	.618	.814	.803	.939	.931						
.136	.124	.177	.158	.266	.220	.402	.402	.441	.437	.483	.473	.621	.620	.815	.811	.940	.933						
.137	.124	.178	.161	.267	.220	.403	-	.442	.438	.484	.474	.622	.619	.816	.805	.941	.934						
.138	.124	.179	.166	.270	.223	.404	.403	.443	.439	.485	.473	.623	.621	.817	.806	.942	.934						
.140	.127	.180	.162	.271	App C	.405	.405	.444	.440	.486	.473	.624	.702	.818	.807	.943	.935						
.141	.127	.181	.163	.272	App C	.406	.403	.445	.441	.487	.474	.625	.602	.819	.804	.950	-						
.142	.128	.182	.163	.273	App C	.407	.404	.446	.442	.488	.473	.626	.605	.820	.802	.951	.941						
.143	.128	.183	.165	.274	App C	.408	.406	.447	.442	.489	.474	.627	.605	.821	.812	.952	.942						
.144	.130	.184	.166	.275	App C	.409	.409	.448	.444	.490	.474	.628	.606	.822	.813	.953	.943						

List of Subjects in 25 CFR Part 170

Highways and roads, Indians—lands.

Dated: February 26, 2004.

David Anderson,

Assistant Secretary—Indian Affairs.

Editorial Note: This document was received in the Office of the Federal Register on July 9, 2004.

■ For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, revises part 170 in title 25 of the Code of Federal Regulations as follows:

PART 170—INDIAN RESERVATION ROADS PROGRAM**Subpart A—Policies, Applicability, and Definitions**

Sec.

170.1 What does this part do?

170.2 What is the IRR Program and BIA Road Maintenance Program policy?

170.3 When do other requirements apply to the IRR Program?

170.4 What is the effect of this part on existing tribal rights?

170.5 What definitions apply to this part?

170.6 Information collection.

Subpart B—Indian Reservation Roads Program Policy and Eligibility**Consultation, Collaboration, Coordination**

170.100 What do the terms “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 Must the Secretary consult with tribal governments before obligating IRR Program funds?

170.105 Are funds available for consultation, collaboration, and coordination activities?

170.106 When must State governments consult with tribes?

170.107 Should planning organizations and local governments consult with tribes when planning for transportation projects?

170.108 Should Indian tribes and BIA consult with States’ planning organizations and local governments in the development of their IRR TIP?

170.109 How do the Secretaries prevent discrimination or adverse impacts?

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

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

Eligible Uses of IRR Program Funds

170.115 What activities may be funded with IRR Program funds?

170.116 What activities are not eligible for IRR Program funding?

170.117 How can a tribe determine whether a new use of funds is allowable?

Use of IRR and Cultural Access Roads

170.120 What restrictions apply to the use of an Indian Reservation Road?

170.121 What is a cultural access road?

170.122 Can a tribe close a cultural access road?

Seasonal Transportation Routes

170.123 What are seasonal transportation routes?

170.124 Does the IRR Program cover seasonal transportation routes?

IRR Housing Access Roads

170.127 What terms apply to access roads?

170.128 Are housing access roads and housing streets eligible for IRR Program funding?

Toll, Ferry and Airport Facilities

170.130 How can tribes use Federal highway funds for toll and ferry facilities?

170.131 How can a tribe find out more about designing and operating a toll facility?

170.132 When can a tribe use IRR Program funds for airport facilities?

Recreation, Tourism and Trails

170.135 Can a tribe use Federal funds for its recreation, tourism, and trails program?

170.136 How can a tribe obtain funds?

170.137 What types of activities can a recreation, tourism, and trails program include?

170.138 Can roads be built in roadless and wild areas?

Highway Safety Functions

170.141 What Federal funds are available for a tribe’s highway safety activities?

170.142 How can tribes obtain funds to perform highway safety projects?

170.143 How can IRR Program funds be used for highway safety?

170.144 What are eligible highway safety projects?

170.145 Are other funds available for a tribe’s highway safety efforts?

Transit Facilities

170.148 What is a tribal transit program?

170.149 How do tribes identify transit needs?

170.150 What Federal funds are available for a tribe’s transit program?

170.151 May a tribe or BIA use IRR Program funds as matching funds?

170.152 What transit facilities and activities are eligible for IRR Program funding?

IRR Program Coordinating Committee

170.155 What is the IRR Program Coordinating Committee?

170.156 What are the IRR Program Coordinating Committee’s responsibilities?

170.157 What is the IRR Program Coordinating Committee’s role in the funding process?

170.158 How does the IRR Program Coordinating Committee conduct business?

Indian Local Technical Assistance Program

170.161 What is the Indian Local Technical Assistance Program?

170.162 How is the Indian LTAP funded?

170.163 How are Indian LTAP recipients selected?

170.164 How are tribal representatives nominated and chosen for the selection committee?

170.165 May a tribe enter into a contract or agreement for Indian LTAP funds?

170.166 What services do Indian LTAP centers provide?

170.167 How does a tribe obtain services from an Indian LTAP center?

170.168 Do Indian LTAP centers offer services similar to those of State LTAPs?

170.169 What can a tribe do if Indian LTAP services are unsatisfactory?

170.170 How are Indian LTAP centers managed?

170.171 How are tribal advisory technical panel members selected?

Indian LTAP-Sponsored Education and Training Opportunities

170.175 What Indian LTAP-sponsored transportation training and educational opportunities exist?

170.176 Where can tribes get scholarships and tuition for Indian LTAP-sponsored education and training?

Appendix A to Subpart B—Allowable Uses of IRR Program Funds

Appendix B to Subpart B—Sources of Tribal Transportation Training and Education Opportunities

Subpart C—Indian Reservation Roads Program Funding**Tribal Transportation Allocation Methodology (TTAM)**

170.200 How does BIA allocate IRR Program funds?

170.201 How does BIA allocate and distribute tribal transportation planning funds?

170.202 Does the Relative Need Distribution Factor allocate funding among tribes?

IRR High Priority Project (IRRHPP)

170.205 What is an IRR High Priority Project (IRRHPP)?

170.206 How is an emergency/disaster defined?

170.207 What is the intent of IRRHPP emergency/disaster funding?

170.208 What funding is available for IRRHPP?

170.209 How will IRRHPP applications be ranked and funded?

170.210 How may a tribe apply for IRRHPP?

170.211 What is the IRRHPP Funding Priority List?

170.212 What is the timeline for IRRHPPs?

170.213 How long are IRRHPP funds available for a project?

170.214 How does award of an emergency/disaster project affect projects on the FPL?

Population Adjustment Factor

170.220 What is the Population Adjustment Factor?

170.221 What funding is available for distribution using the PAF?

Relative Need Distribution Factor

170.223 What is the Relative Need Distribution Factor (RNDF)?

IRR Inventory and Long-Range Transportation Planning (LRTP)

170.225 How does the LRTP process relate to the IRR Inventory?
170.226 How will this part affect the IRR Inventory?
170.227 How does BIA develop and use the IRR Inventory?
170.228 Are all facilities included in the IRR Inventory used to calculate CTC?

General Data Appeals

170.231 May a tribe challenge the data BIA uses in the RNDF?
170.232 How does a tribe appeal a disapproval from the BIA Regional Director?

Flexible Financing

170.300 May tribes use flexible financing to finance IRR transportation projects?
170.301 Can a tribe use IRR Program funds to leverage other funds or pay back loans?
170.302 Can BIA regional offices borrow IRR Program funds from each other?
170.303 Can a tribe apply for loans or credit from a State infrastructure bank?
Appendix A to Subpart C—IRR High Priority Project Scoring Matrix
Appendix B to Subpart C—Population Adjustment Factor
Appendix C to Subpart C—Relative Need Distribution Factor
Appendix D to Subpart C—Cost to Construct

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

Transportation Planning

170.400 What is the purpose of transportation planning?
170.401 What is BIA's role in transportation planning?
170.402 What is the tribal role in transportation planning?
170.403 What IRR Program funds can be used for transportation planning?
170.404 What happens when a tribe uses its IRR Program construction funds for transportation planning?
170.405 Can tribal transportation planning funds be used for road construction and other projects?
170.406 How must tribes use planning funds?
170.407 What happens to unobligated planning funds?

Long-Range Transportation Planning

170.410 What is the purpose of tribal long-range transportation planning?
170.411 What can a long-range transportation plan include?
170.412 How is the tribal IRR long-range transportation plan developed and approved?
170.413 What is the public role in developing the long-range transportation plan?

170.414 How is the tribal long-range transportation plan used and updated?
170.415 What is pre-project planning?

Transportation Improvement Program

170.420 What is the tribal priority list?
170.421 What is the Tribal Transportation Improvement Program (TTIP)?
170.422 What is the IRR Transportation Improvement Program (IRRTIP)?
170.423 How are projects placed on the IRRTIP?
170.424 How does the public participate in developing the IRRTIP?
170.425 How does BIA update the IRRTIP?
170.426 What is the approval process for the IRRTIP?
170.427 How may an IRRTIP be amended?
170.428 How is the State Transportation Improvement Program related to the IRRTIP?

Public Hearings

170.435 How does BIA or the tribe determine the need for a public hearing?
170.436 How are public hearings for IRR planning and projects funded?
170.437 How must BIA or a tribe inform the public when no hearing is held?
170.438 How must BIA or a tribe inform the public when a hearing is held?
170.439 How is a public hearing conducted?
170.440 How can the public learn the results of a public hearing?
170.441 Can a decision resulting from a hearing be appealed?

IRR Inventory

170.442 What is the IRR Inventory?
170.443 How can a tribe list a proposed transportation facility in the IRR Inventory?
170.444 How is the IRR Inventory updated?
170.445 What is a strip map?

Environmental and Archeological Requirements

170.450 What archeological and environmental requirements must the IRR Program meet?
170.451 Can IRR Program funds be used for archeological and environmental compliance?

Design

170.454 What design standards are used in the IRR Program?
170.455 How are design standards used in IRR projects?
170.456 When can a tribe request an exception from the design standards?
170.457 Can a tribe appeal a denial?

Review and Approval of Plans, Specifications, and Estimates

170.460 What must a project package include?
170.461 May a tribe approve plans, specifications, and estimates?
170.462 When may a self-determination contract or self-governance agreement include PS&E review and approval?
170.463 What should the Secretary do if a design deficiency is identified?

Construction and Construction Monitoring

170.470 What are the IRR construction standards?
170.471 How are projects administered?
170.472 What construction records must tribes and BIA keep?
170.473 What happens when a construction project ends?
170.474 Who conducts the project closeout?

Program Reviews and Management Systems

170.500 What program reviews do the Secretaries conduct?
170.501 What happens when the review process identifies areas for improvement?
170.502 Are management systems required for the IRR Program?
170.503 How are IRR Program management systems funded?

Bridge Inspection

170.504 When and how are bridge inspections performed?
170.505 How must bridge inspections be coordinated?
170.506 What are the minimum qualifications for certified bridge inspectors?
170.507 Who reviews bridge inspection reports?
Appendix A to Subpart D—Cultural Resource and Environmental Requirements for the IRR Program
Appendix B to Subpart D—Design Standards for the IRR Program

Subpart E—Service Delivery for Indian Reservation Roads

Funding Process

170.600 What must BIA include in the notice of availability of funds?
170.601 What happens to the unused portion of IRR Program management and oversight funds reserved by the Secretary?
170.602 If a tribe incurs unforeseen construction costs, can it get additional funds?

Miscellaneous Provisions

170.605 When may BIA use force account methods in the IRR Program?
170.606 How do legislation and procurement requirements affect the IRR Program?
170.607 Can a tribe use its allocation of IRR Program funds for contract support costs?
170.608 Can a tribe pay contract support costs from Department of the Interior or BIA appropriations?

Contracts and Agreements Under ISDEAA

170.610 What IRR Program functions may a tribe assume under ISDEAA?
170.611 What special provisions apply to ISDEAA contracts and agreements?
170.612 How are non-contractible functions funded?
170.613 When does BIA determine the amount of funds needed for non-contractible non-project related functions?
170.614 Can a tribe receive funds before BIA publishes the notice of funding availability?

- 170.615 Can a tribe receive advance payments for non-construction activities?
- 170.616 How are advance payments made when additional IRR Program funds are made available after execution of the self-governance agreement?
- 170.617 May a tribe include a contingency in its proposal budget?
- 170.618 Can a tribe keep savings resulting from project administration?
- 170.619 Do tribal preference and Indian preference apply to IRR Program funding?
- 170.620 How do ISDEAA's Indian preference provisions apply?
- 170.621 What if a tribe fails to substantially perform work under a contract or agreement?
- 170.622 What IRR programs, functions, services, and activities are subject to the self-governance construction regulations?
- 170.623 How are IRR Program projects and activities included in a self-governance agreement?
- 170.624 Is technical assistance available?
- 170.625 What regulations apply to waivers?
- 170.626 How does a tribe request a waiver of a Department of Transportation regulation?
- Appendix A to Subpart E—IRR Program functions that are not otherwise contractible

Subpart F—Program Oversight and Accountability

- 170.700 What is the IRR Program stewardship plan?
- 170.701 May a direct service tribe and BIA Region sign a Memorandum of Understanding?
- 170.702 What activities may the Secretary review and monitor?

Subpart G—BIA Road Maintenance

- 170.800 Who owns IRR transportation facilities?
- 170.801 What is the BIA Road Maintenance Program?
- 170.802 How is road maintenance funded?
- 170.803 What facilities are eligible under the BIA Road Maintenance Program?
- 170.804 How is BIA's Road Maintenance Program related to the IRR Program?
- 170.805 What are the local, tribal, and BIA roles in transportation facility maintenance?
- 170.806 What is an IRR Transportation Facilities Maintenance Management System (IRR TFMMS)?
- 170.807 What must BIA include when it develops an IRR Transportation Facilities Maintenance Management System?
- 170.808 Can BIA Road Maintenance Program funds be used to improve IRR transportation facilities?
- 170.809 Can a tribe perform road maintenance under a self-determination contract or self-governance agreement?
- 170.810 To what standards must an IRR transportation facility be maintained?
- 170.811 What happens if lack of funds results in inadequate maintenance?
- 170.812 What is emergency maintenance?

- 170.813 When can access to IRR transportation facilities be restricted?
- Appendix A to Subpart G—List of Activities Eligible for Funding Under BIA Transportation Facility Maintenance Program

Subpart H—Miscellaneous Provisions

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 is the role of State, tribal, and local governments?
- 170.903 Who notifies tribes of the transport of radioactive waste?
- 170.904 Who responds to an accident involving a radioactive or hazardous materials shipment?
- 170.905 How can tribes obtain training in handling hazardous material?
- 170.906 Who cleans up radioactive and hazardous material spills?

Reporting Requirements and Indian Preference

- 170.910 What information on the IRR Program or projects must BIA provide to tribes?
- 170.911 Are Indians entitled to employment and training preferences?
- 170.912 Does Indian employment preference apply to Federal-aid Highway Projects?
- 170.913 Do tribal-specific employment rights and contract preference laws apply?
- 170.914 What is the difference between tribal employment preference and Indian employment preference?
- 170.915 May tribal employment taxes or fees be included in an IRR project budget?
- 170.916 May tribes impose taxes or fees on those performing IRR Program services?
- 170.917 Can tribes receive direct payment of tribal employment taxes or fees?

Emergency Relief

- 170.920 What is the purpose of the provisions relating to emergency relief?
- 170.921 What emergency or disaster assistance programs are available?
- 170.922 How can States get Emergency Relief Program funds to repair IRR System damage?
- 170.923 What qualifies for ERFO funding?
- 170.924 What happens if DOT denies an ERFO claim?
- 170.925 Is ERFO funding supplemental to IRR Program funding?
- 170.926 Can a tribe administer approved ERFO repairs under a self-determination contract or a self-governance agreement?
- 170.927 How can FEMA Program funds be used to repair damage?

Tribal Transportation Departments

- 170.930 What is a tribal transportation department?
- 170.931 Can tribes use IRR Program funds to pay tribal transportation department operating costs?

- 170.932 Are there other funding sources for tribal transportation departments?
- 170.933 Can tribes regulate oversize or overweight vehicles?

Resolving Disputes

- 170.934 Are alternative dispute resolution procedures available?
- 170.935 How does a direct service tribe begin the alternative dispute resolution process?

Other Miscellaneous Provisions

- 170.941 May tribes become involved in transportation research?
- 170.942 Can a tribe use Federal funds for 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), 202, 204, 308; 25 U.S.C. 47, 25 U.S.C. 450.

Subpart A—Policies, Applicability, and Definitions

§ 170.1 What does this part do?

This part provides rules and a funding formula for the Department of the Interior (DOI) in implementing the Indian Reservation Roads (IRR) Program. 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 of 1975, as amended (ISDEAA).

§ 170.2 What is the IRR Program and BIA Road Maintenance Program policy?

(a) It is the policy of the Secretary of the Interior and the Secretary of Transportation (Secretaries) to do the following in relation to the IRR and BIA Road Maintenance Programs:

- (1) Provide a uniform and consistent set of rules;
- (2) Foster knowledge of the programs by providing information about them and the opportunities that they create;
- (3) Facilitate tribal planning, conduct, and administration of the programs;
- (4) Encourage the inclusion of these programs under self-determination contracts or self-governance agreements;
- (5) Make available all contractible administrative functions under self-determination contracts or self-governance agreements; and
- (6) Implement policies, procedures, and practices in consultation with Indian tribes to ensure the letter, spirit, and goals of Federal transportation programs are fully implemented.

(b) Where this part differs from provisions in the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), this part should advance the policy of

increasing tribal autonomy and discretion in program operation.

(c) This part is designed to enable Indian tribes to participate in all contractible IRR and BIA Road Maintenance programs. The Secretary of the Interior will afford Indian tribes the flexibility, information, and discretion to design roads programs under self-determination contracts and self-governance agreements to meet the needs of their communities consistent with this part.

(d) The Secretaries recognize that programs, functions, services, and activities, regardless of how they are administered, are an exercise of Indian tribes' self-determination and self-governance.

(1) The tribe is responsible for managing the day-to-day operation of its 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 all 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 tribes and the trust resources of individual Indians.

(e) The Secretary should interpret Federal laws and regulations to facilitate including programs covered by this part in the government-to-government agreements authorized under ISDEAA.

(f) The administrative functions referenced in paragraph (a)(5) of this section are contractible without regard to the organizational level within the Department of the Interior that carries out these functions. Including IRR Program administrative functions under self-determination contracts and self-governance agreements does not limit or reduce the funding for any program or service serving any other tribe.

(g) The Secretary is not required to reduce funding for a tribe under these programs to make funds available to another tribe.

(h) This part must be liberally construed for the benefit of tribes and to implement the Federal policy of self-determination and self-governance.

(i) Any ambiguities in this part must be construed in favor of the tribes so as to facilitate and enable the transfer of programs authorized by 23 U.S.C. 202 and title 25 U.S.C.

§ 170.3 When do other requirements apply to the IRR Program?

IRR Program Policy and Guidance Manuals and directives apply to the IRR

Program only if they are consistent with this part and 25 CFR parts 900 and 1000. See 25 CFR part 900.5 for when a tribe must comply with other unpublished requirements.

§ 170.4 What is the effect of this part on existing tribal rights?

This part does not:

- (a) Affect the sovereign immunity from suit enjoyed by tribes;
- (b) Terminate or reduce the trust responsibility of the United States to tribes or individual Indians;
- (c) Require a tribe to assume a program relating to the IRR Program; or
- (d) Impede awards by other agencies of the United States or a State to tribes to administer programs under any other law.

§ 170.5 What definitions apply to this part?

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

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

Appeal means a request by a tribe or consortium for an administrative review of an adverse agency decision.

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

BIADOT means the Bureau of Indian Affairs, Division of Transportation.

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

BIA Road System means the Bureau of Indian Affairs Road System under the IRR system. It includes those existing and proposed IRR's for which BIA has or plans to obtain legal right-of-way. BIA has the primary responsibility to improve and maintain the roads on this system.

CFR means the United States Code of Federal Regulations.

Construction means the supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of an IRR transportation facility, as defined in 23 U.S.C. 101. This includes bond costs and other related costs of bonds or other debt financing instruments. It also includes costs incurred by the State in performing Federal-aid project related audits that directly benefit the Federal-aid highway program. The term includes—

- (1) Locating, surveying, and mapping (including establishing temporary and permanent geodetic markers in accordance with specifications of the U.S. Geological Survey);

(2) Resurfacing, restoration, and rehabilitation;

(3) Acquiring rights-of-way;

(4) Providing relocation assistance; acquiring replacement housing sites; and acquiring, rehabilitating, relocating, and constructing replacement housing;

(5) Eliminating hazards of railway grade crossings;

(6) Eliminating roadside obstacles;

(7) Making improvements that facilitate and control traffic flow, such as grade separation of intersections, widening lanes, channelizing traffic, installing traffic control systems, and establishing 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 contract for a 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 BIA 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.

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 ISDEAA or a procurement document issued under Federal or tribal procurement acquisition regulations.

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

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 of the Department of Transportation.

FTA means the Federal Transit Administration of the Department of Transportation.

Governmental subdivision of a tribe means a unit of a federally-recognized tribe which is authorized to participate in an IRR Program activity on behalf of the tribe.

Indian means a person who is a member of a Tribe or as otherwise defined in 25 U.S.C. 450b.

Indian Reservation Road (IRR) means a public road that is located within or provides access to an Indian reservation or Indian trust land, or restricted Indian land that is not subject to fee title alienation without the approval of the Federal government, or Indian or Alaska Native Villages, groups, or communities in which Indians and Alaska Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

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 highway bridges.

IRR Inventory means a comprehensive database of all transportation facilities eligible for IRR Program funding by tribe, reservation, 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, and ownership.

IRR Program means a part of the Federal Lands Highway Program established in 23 U.S.C. 204 to address transportation needs of tribes.

IRR Program construction funds means the pool of funds BIA distributes according to the Relative Need Distribution Factor.

IRR Program funds means the funds covered in chapter 2 of title 23 U.S.C. and the associated program management costs. These funds are used for:

(1) Transportation planning, research, and engineering; and

(2) Construction of highways, roads, parkways, or transit facilities within or providing access to Indian lands, communities, and Alaska Native villages.

IRR Program management and oversight funds means those funds authorized by Congress to pay the cost of performing IRR Program management activities.

IRR System means all the roads and bridges that comprise the IRR.

IRR transportation facilities means public roads, bridges, drainage structures, culverts, ferry routes, marine terminals, transit facilities, boardwalks, pedestrian paths, trails, and their appurtenances, and other transportation facilities as designated by the tribe and the Secretary.

IRR Transportation Improvement Program (IRRTIP) means a list developed by BIA of projects programmed for construction in the next 3 to 5 years.

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

Maintenance means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for safe and efficient utilization of the highway.

NBI means the national bridge inventory, which is the database of structural and appraisal data collected to fulfill the requirements of the National Bridge Inspection Standards, as defined in 23 CFR part 650, subpart C. Each State and BIA must maintain an inventory of all bridges that are subject to the NBI standards and provide this data to the Federal Highway Administration (FHWA). The NBI is maintained and monitored by the FHWA Office of Bridge Technology.

Office of Self-Governance (OSG) means the office within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior, that is responsible for implementing and developing tribal self-governance.

Program means any program, function, service, activity, or portion thereof.

Project Planning means project-related activities that precede the design phase of a transportation project. Examples of these activities are: Collecting data on traffic, accidents, or functional, safety or structural deficiencies; corridor studies; conceptual studies, environmental studies; geotechnical studies; archaeological studies; project scoping; public hearings; location analysis; preparing applications for permits and clearances; and meetings with facility owners and transportation officials.

Proposed road means a road which does not currently exist and needs to be constructed.

Public Authority means a Federal, State, county, town, or township, Indian tribe, municipal, or other local government or instrumentality with

authority to finance, build, operate, or maintain toll or toll-free facilities.

Public road means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.

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

Regionally significant project means a project that modifies a facility that serves regional transportation needs and would normally be included in the modeling of a metropolitan area's transportation network. The term includes work on principal arterial highways and all fixed guideway transit facilities that offer a significant alternative to regional highway travel. ("Regional transportation needs" includes 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).

Rehabilitation means the work required to restore the structural integrity of transportation facilities as well as work necessary to correct safety defects.

Relocation means the adjustment of transportation facilities and utilities required by a 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.

Relocation Services means payment and assistance authorized by the Uniform Relocation and Real Property Acquisitions Policy Act, 42 U.S.C. 4601 *et seq.*, as amended.

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.

Secretary of Transportation means the Secretary of Transportation or a 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.

STIP means Statewide Transportation Improvement Program. It 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 reviews and approves the STIP for each State.

Transit means services, equipment, and functions associated with the public movement of people served within a community or network of communities.

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

Tribal transportation planning funds means funds referenced in 23 U.S.C. 204(j).

Tribes means any 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 that 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.

TTIP means Tribal Transportation Improvement Program. It is a multi-year financially constrained list of proposed transportation projects developed by a tribe from the tribal priority list or the long-range transportation plan.

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

§ 170.6 Information Collection.

The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. *et seq.* and assigned clearance number 1076–0161. This information collection is specifically found in subparts C and D of this part and represent a total reporting burden to the public of 31,470 hours or an average of 56.5 hours per respondent. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Comments and suggestions on the burden estimate or any other aspect of the form should be sent directly to the Office of Management and Budget; Attention: Interior Desk Officer;

Washington, DC 20503; and a copy of the comments should be sent to the Information Collection Clearance Officer, Bureau of Indian Affairs, 1849 C Street, NW., Washington, DC 20240.

Subpart B—Indian Reservation Roads Program Policy and Eligibility

Consultation, Collaboration, Coordination

§ 170.100 What do the terms "consultation, collaboration, and coordination" mean?

(a) 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.

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

(c) Coordination means that each party:

(1) Shares and compares in a timely manner its transportation plans, programs, projects, and schedules with the related plans, programs, projects, and schedules of the other parties; and

(2) Adjusts its 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?

(a) The IRR Program's 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 undertaking the following, similar, or related activities:

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

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

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

(4) Developing IRR Program transportation projects;

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

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

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

(8) Assisting in the development of State and tribal agreements related to the IRR Program;

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

(10) Assisting in the submission of discretionary grant applications for State and Federal funding for IRR transportation facilities.

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

§ 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, and programs on tribal rights and interests to ensure that these rights and concerns are appropriately considered.

§ 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;

(c) Promote the rights of tribal governments to receive direct transportation services from the Federal Government or to enter into 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) Reduce the imposition of unfunded mandates upon tribal governments;

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

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

(h) Ensure that tribal rights and interests are appropriately considered during program development;

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

(j) Consult with, and solicit the participation of, tribes in the development of the annual BIA budget proposals.

§ 170.104 Must the Secretary consult with tribal governments before obligating IRR Program funds?

Yes. Before obligating IRR program funds on any project that is for direct service activities, the Secretary must consult with the affected tribe to determine the tribal preferences concerning the project. The Secretary must provide information in accordance with § 170.600 within 30 days of the Notice of Availability of Funds publication in the **Federal Register**.

§ 170.105 Are funds available for consultation, collaboration, and coordination activities?

To fund consultation, collaboration, and coordination of IRR Program activities, tribes may use:

(a) The tribes' IRR Program allocations;

(b) Tribal Priority Allocation (TPA) funds;

(c) Administration for Native Americans (ANA) funds;

(d) Economic Development Administration (EDA) funds;

(e) United States Department of Agriculture (USDA) Rural Development 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; and

(i) Any other funds available for the purpose of consultation, collaboration, and coordination activities.

§ 170.106 When must State governments consult with tribes?

Each State must develop the State Transportation Improvement Program (STIP) in consultation with tribes and BIA in those areas under Indian tribal jurisdiction. This includes providing for a fully coordinated transportation planning process that coordinates transportation planning efforts carried

out by the State with transportation planning efforts carried out by tribes. 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.

§ 170.107 Should planning organizations and local governments consult with tribes when planning for transportation projects?

Yes. The Department's policy is to foster and improve communication, cooperation, and coordination among metropolitan planning organizations (MPOs), regional planning organizations (RPOs), local governments, municipal governments, and tribes on transportation matters of common concern. Accordingly, planning organizations and local governments should consult with tribal governments when planning for transportation projects.

§ 170.108 Should Indian tribes and BIA consult with States' planning organizations and local governments in the development of their IRRTP?

Yes.

(a) All regionally significant IRR Program projects must be:

(1) Developed in cooperation with State and metropolitan planning organizations; and

(2) Included in appropriate Federal Lands Highway Program transportation improvement programs for inclusion in state and metropolitan plans.

(b) BIA and tribes are encouraged to consult with States, metropolitan and regional planning organizations, and local and municipal governments, on transportation matters of common concern.

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

In administering the IRR Program, the Secretaries ensure that nondiscrimination and environmental justice principles are integral program elements. The Secretaries consult with tribes early in the program development process to identify potential discrimination and to recommend 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 impacts?

(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 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 affecting 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 the Federal Transit Authority (FTA), as appropriate, to report the problem and seek assistance in resolving the problem.

Eligible Uses if IRR Program Funds

§ 170.115 What activities may be funded with IRR Program funds?

(a) IRR Program funds may be used:

(1) For all of the items listed in appendix A to this subpart;

(2) For other purposes identified in this part; or

(3) For other purposes recommended by the IRR Program Coordinating Committee under the procedures in Appendix A to Subpart B (35) and § 170.156 and approved by FHWA or BIA pursuant to § 170.117.

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

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

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

(a) Routine maintenance work such as: grading shoulders and ditches; cleaning culverts; snow removal, roadside mowing, normal sign repair and replacement, painting roadway structures, and the maintaining, cleaning, or repair of 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 in this part; or

(g) Condemnation of land for recreational trails.

§ 170.117 How can a tribe determine whether a new use of funds is allowable?

(a) A tribe that proposes new uses of IRR Program funds must ask BIA in writing whether the proposed use is eligible under Federal law. The tribe must also provide a copy of its inquiry to FHWA.

(1) In cases involving eligibility questions that refer to 25 U.S.C., BIA will determine whether the new proposed use of IRR Program funds is allowable and provide a written response to the requesting tribe within 45 days of receiving the written inquiry. Tribes may appeal a denial of a proposed use by BIA under 25 CFR part 2. The address is: Department of the Interior, BIA, Division of Transportation, 1849 C Street, NW., MS 4058-MIB, Washington, DC 20240.

(2) In cases involving eligibility questions that refer to the IRR Program or 23 U.S.C., BIA will refer an inquiry to FHWA for decision. FHWA must provide a written response to the requesting tribe within 45 days of receiving the written inquiry from the tribe. Tribes may appeal denials of a proposed use by the FHWA to: FHWA, 400 7th St., SW., HFL-1, Washington, DC 20590.

(b) To the extent practical, the deciding agency must consult with the IRR Program Coordinating Committee before denying a request. BIA and FHWA will send copies of all eligibility determinations to the IRR Program Coordinating Committee and BIA Regional offices.

(c) If either BIA or FHWA fails to issue the requesting tribe a timely response to the eligibility inquiry, the proposed use will be deemed to be allowable for that specific project.

Use of IRR and Cultural Access Roads

§ 170.120 What restrictions apply to the use of an Indian Reservation Road?

Indian Reservation Roads (IRRs) must 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 when required for public safety, fire prevention or suppression, fish or game protection, low load capacity bridges, prevention of damage to unstable roadbeds, or as contained in §§ 170.122 and 170.813;

(b) Conduct engineering and traffic analysis 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 signs and pavement markings.

§ 170.121 What is a cultural access road?

(a) 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:

- (1) Sacred and medicinal sites;
- (2) Gathering medicines or materials such as grasses for basket weaving; or
- (3) Other traditional activities, including, but not limited to, subsistence hunting, fishing and gathering.

(b) A tribal government may unilaterally designate a tribal 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.

(c) In order for a tribal government to designate a non-tribal road as a cultural access road, it must enter into an agreement with the public authority having jurisdiction over the road.

(d) Cultural access roads may be included in the IRR Inventory if they meet the definition of an IRR.

§ 170.122 Can a tribe close a cultural access road?

(a) A tribe with jurisdiction over a cultural access road can close it. The tribe can do this:

(1) During periods when the tribe or tribal members are involved in cultural activities; and

(2) In order to protect the health and safety of the tribal members or the general public.

(b) Cultural access roads designated through an agreement with a public authority may only be closed according to the provisions of the agreement. See § 170.121(c).

Seasonal Transportation Routes

§ 170.123 What are seasonal transportation routes?

Seasonal transportation routes are non-recreational transportation routes in the IRR Inventory that provide access to

Indian communities or villages and may not be open for year-round use. They include snowmobile trails, ice roads, and overland winter roads.

§ 170.124 Does the IRR Program cover seasonal transportation routes?

Yes. IRR Program funds can be used to build seasonal transportation routes and a tribe may request that BIA include seasonal transportation routes in the IRR Inventory.

(a) Standards for seasonal transportation routes are found in the design standards identified in appendix B to subpart D. A tribe can also develop or adopt standards that are equal to or exceed these standards.

(b) Construction of a seasonal transportation route requires a right-of-way or use permit.

IRR Housing Access Roads

§ 170.127 What terms apply to access roads?

(a) *IRR housing access road* means a public road on the IRR System that provides access to a housing cluster.

(b) *IRR housing street* means a public road on the IRR System that provides access to adjacent homes within a housing cluster.

(c) *Housing cluster* means three or more existing or proposed housing units.

§ 170.128 Are housing access roads and housing streets eligible for IRR Program funding?

Yes. IRR housing access roads and housing streets on public rights-of-way are eligible for construction, reconstruction, and rehabilitation funding under the IRR Program. Tribes, following the transportation planning process as required in subpart D, may include housing access roads and housing street projects on the Tribal Transportation Improvement Program (TTIP). IRR Program funds are available after the projects are listed on the FHWA-approved IRR TIP.

Toll, Ferry and Airport Facilities

§ 170.130 How can tribes use Federal highway funds for toll and ferry facilities?

(a) A tribe can use Federal-aid highway funds, including IRR Program funds, to study, design, construct, and operate toll highways, bridges, and tunnels, as well as ferry boats and ferry terminal facilities. The following table shows how a tribe can initiate construction of these facilities.

To initiate construction of a . . .	A tribe must . . .
(1) Toll highway, bridge, or tunnel	(i) Meet and follow the requirements set forth in 23 U.S.C. 129; and (ii) If IRR Program funds are used, enter into a self-tunnel governance agreement or self-determination contract with the Secretary of the Interior.
(2) Ferry boat or ferry terminal	Meet and follow the requirements set forth in 23 U.S.C. 129(c).

(b) A tribe can use IRR Program funds to fund 100 percent of the conversion or construction of a toll facility.

(c) If a tribe obtains non-IRR Program Federal funding for the conversion or construction of a toll facility, these funds will cover a maximum of 80 percent of the project cost. In this case, the tribe may use IRR Program funds for the required 20 percent local match.

§ 170.131 How can a tribe find out more about designing and operating a toll facility?

Information on designing and operating a toll highway, bridge or tunnel is available from the International Bridge, Tunnel and Turnpike Association. The Association publishes a variety of reports, statistics, and analyses. The Web site is located at <http://www.ibtta.org>. Information is also available from FHWA.

§ 170.132 When can a tribe use IRR Program funds for airport facilities?

(a) A tribe can use IRR Program funds for construction of airport and heliport access roads, if the access roads are open to the public.

(b) A tribe cannot use IRR Program funds to construct or improve runways, airports or heliports. Funds for these uses are available under the Airport Improvement Program (AIP) from the Federal Aviation Administration (FAA). (See FAA Advisory Circular No. 150/5370-10A.)

Recreation, Tourism and Trails

§ 170.135 Can a tribe use Federal funds for its recreation, tourism, and trails program?

Yes. A tribe, tribal organization, tribal consortium, or BIA may use IRR Program funds for recreation, tourism, and trails programs if the programs are included in the IRR TIP. Additionally, the following Federal programs for recreation, tourism, and trails are possible sources of Federal funding:

- (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);

(g) Other funding from other Federal departments; and

(h) Other funding that Congress may authorize and appropriate.

§ 170.136 How can a tribe obtain funds?

(a) To receive funding for programs that serve recreation, tourism, and trails' goals, a tribe should:

- (1) Identify a program meeting the eligibility guidelines for the funds and have it ready for development; and
- (2) Have a viable project ready for improvement or construction, including necessary permits.

(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. A tribe may ask:

- (1) To administer these programs under the State's locally administered project program; or
 - (2) That for projects that are otherwise contractible under Public Law 93-638 (25 U.S.C. 450 *et seq.*), that the State return the funds to FHWA and have them transferred to BIA for tribal self-determination contracts or self-governance agreements under ISDEAA.
- (c) Congress provides funds under 23 U.S.C. 205 and 214 for activities for Federal agencies. A tribe can contract with all agencies within the Department of the Interior under ISDEAA for this work.

(d) In order to use National Scenic Byway funds, the project must be on a road designated as a State or Federal scenic byway.

(e) In order to expend non-IRR Program Federal funds for its recreation, tourism, and trails programs, a tribe must ensure that the project is on an approved TIP or STIP.

§ 170.137 What types of activities can a recreation, tourism, and trails program include?

- (a) The following are examples of activities that tribes and tribal organizations 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 (see 23 U.S.C. 319);

(13) Bicycle Transportation and pedestrian walkways (see 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 programs.

(c) Tribes may use IRR Program funds for any activity that is eligible for Federal funding under any provision of title 23 U.S.C.

§ 170.138 Can roads be built in roadless and wild areas?

Under 25 CFR part 265 no roads can be built in roadless and wild areas on Indian reservations.

Highway Safety Functions

§ 170.141 What Federal funds are available for a tribe's highway safety activities?

Federal funds available for a tribe's highway safety activities include, but are not limited to, the following which may be amended, repealed, or added to:

- (a) The tribes' IRR Program allocations under 23 U.S.C. 204;
- (b) Highway Safety Program funds under 23 U.S.C. 402;
- (c) Occupant protection program funds under 23 U.S.C. 405;
- (d) Alcohol traffic safety program funds under 23 U.S.C. 408;

(e) Alcohol-impaired driver countermeasures under 23 U.S.C. 410;

(f) Funding for highway safety activities from the U.S. Department of Health and Human Services (HHS);

(g) Indian Highway Safety Program 25 CFR 181; and

(h) Other funding that Congress may authorize and appropriate.

§ 170.142 How can tribes obtain funds to perform highway safety projects?

There are two methods to obtain 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 obtain a contract or agreement under ISDEAA for these projects.

(b) FHWA provides funds to the States under 23 U.S.C. 402, 405, 408, and 410. States annually solicit proposals from tribes and local governments. Tribes may request:

(1) To administer these programs under the State's locally administered project program; or

(2) That for projects that are otherwise contractible under Public Law 93-638 (25 U.S.C. 450 *et seq.*), that the State return the funds to FHWA and have them transferred to BIA for tribal self-determination contracts or self-governance agreements under ISDEAA.

§ 170.143 How can IRR Program funds be used for highway safety?

A tribe, tribal organization, tribal consortium, or BIA may fund projects to improve highway safety. Those projects that are not fully funded by the BIA-administered Indian Highway Safety Program must be incorporated into the FHWA-approved IRR TIP if IRR Program funds are used to complete funding of the project.

§ 170.144 What are eligible highway safety projects?

The following are examples of 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 IRRs, 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, breathalyzer, video cameras.

§ 170.145 Are other funds available for a tribe's highway safety efforts?

Yes. Tribes may seek grant and program funding for highway safety activities from appropriate Federal, state, and local agencies and private grant organizations.

Transit Facilities

§ 170.148 What is a tribal transit program?

A tribal transit program is the planning, administration, acquisition, and operation and maintenance of a 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.

§ 170.149 How do tribes identify transit needs?

Tribes identify transit needs during the tribal transportation planning process (see subpart D). Transit projects using IRR Program funds must be included in the FHWA-approved IRR TIP.

§ 170.150 What Federal funds are available for a tribe's transit program?

Title 23 U.S.C. authorizes the use of IRR Program funds for transit facilities as defined in this part. Additionally, there are many sources of Federal funds that may help support tribal transit programs. These include the Federal 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 at <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; and 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 Program, 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.

§ 170.151 May a tribe or BIA use IRR Program funds as matching funds?

(a) A tribe may use 23 U.S.C. 204 IRR Program 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.

(b) BIA may use 23 U.S.C. 204 IRR Program funds to pay local matching funds for transit facilities and transit activities funded under 23 U.S.C. 104.

§ 170.152 What transit facilities and activities are eligible for IRR Program funding?

Transit facilities and activities eligible for IRR Program funding include, but are not limited to:

(a) Acquiring, constructing, supervising or inspecting new, used or refurbished equipment, buildings, facilities, buses, vans, water craft, and other vehicles for use in mass transportation;

(b) Transit-related intelligent transportation systems;

(c) Rehabilitating, remanufacturing, 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).

IRR Program Coordinating Committee

§ 170.155 What is the IRR Program Coordinating Committee?

(a) Under this part, the Secretaries will establish an IRR Program Coordinating Committee that:

(1) Provides input and recommendations to BIA and FHWA in developing IRR Program policies and procedures; and

(2) Supplements government-to-government consultation by coordinating with and obtaining input from tribes, BIA, and FHWA.

(b) The Committee consists of 12 tribal regional representatives (one from each BIA Region) and two non-voting Federal representatives (FHWA and BIA). The Secretary of the Interior 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 officially selected by the region's tribes.

(1) 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.

(2) 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.

(e) The Secretary of the Interior will provide guidance regarding the replacement of representatives should the need arise.

§ 170.156 What are the IRR Program Coordinating Committee's responsibilities?

(a) Committee responsibilities are to provide input and recommendations to BIA and FHWA during the development or revision of:

(1) BIA/FHWA IRR Program Stewardship Plan;

(2) IRR Program policy and procedures;

(3) IRR Program eligible activities determination;

(4) IRR Program transit policy;

(5) IRR Program regulations;

(6) IRR Program management systems policy and procedures;

(7) IRR Program fund distribution formula (as outlined in § 170.157); and

(8) National tribal transportation needs.

(b) The Committee may establish work groups to carry out its responsibilities; and

(c) The Committee also reviews and provides recommendations on IRR Program national concerns (including the implementation of this part) brought to its attention.

§ 170.157 What is the IRR Program Coordinating Committee's role in the funding process?

The Committee's role is to provide input and recommendations to BIA and FHWA regarding:

(a) New IRR Inventory Data Format and Form;

(b) Simplified Cost to Construct (CTC) Methodology (including formula calculations, formula program and design, and bid tab methodology);

(c) Cost Elements;

(d) Over-Design Issues;

(e) Inflation Impacts on \$1 Million Cap for IRRHPP and Emergency Projects (including the IRRHPP Ranking System and emergency/disaster expenditures report); and

(f) The impact of including funded but non-constructed projects in the CTC calculation.

§ 170.158 How does the IRR Program Coordinating Committee conduct business?

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. 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 Chair.

(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 Chair, a Vice-Chair, and other officers. These officers will be responsible for preparing for and conducting Committee meetings and summarizing meeting results. These officers will also have other duties that the Committee may prescribe.

(f) 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.

(g) The Committee's budget will be funded through the IRR Program management and oversight funds, not to exceed \$150,000 annually.

Indian Local Technical Assistance Program

§ 170.161 What is the Indian Local Technical Assistance Program?

The Indian Local Technical Assistance Program (Indian LTAP) is authorized under 23 U.S.C. 504(b), and §§ 170.161 through 170.176 are provided for information only. The Program assists tribal governments and other IRR Program participants in extending their technical capabilities by providing them greater access to transportation technology, training, and research opportunities.

§ 170.162 How is the Indian LTAP funded?

FHWA uses Highway Trust Funds to fund the Indian LTAP. BIA may use IRR Program management and oversight funds 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 should apply for supplemental funding from other sources to accommodate their needs.

§ 170.163 How are Indian LTAP recipients selected?

(a) FHWA announces Indian LTAP grant, cooperative agreement, and contracting opportunities in the **Federal Register**. The announcements state that tribal governments, a consortium of tribal governments, State transportation departments, or universities are eligible for these awards; indicate the funds available; and provide 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) A selection committee of Federal and tribal representatives (see § 170.164) reviews the proposals of eligible applicants and recommends award recipients. FHWA selects and notifies

award recipients consistent with applicable law.

§ 170.164 How are tribal representatives nominated and chosen for the selection committee?

In its written notice to tribal governments announcing opportunities under the Indian LTAP, FHWA requests nominations within each Indian LTAP's service area for representatives to serve on the selection committee. Forty-five days after receiving the request for nominations, FHWA will notify tribal governments of the nominees for the service area. Each tribe then has 30 days to notify FHWA of its selection from the nominees.

§ 170.165 May a tribe enter into a contract or agreement for Indian LTAP funds?

Yes. If selected for an award as an Indian LTAP Center, a tribe will enter into a cooperative agreement with the FHWA and be subject to the guidelines of the agreement.

§ 170.166 What services do Indian LTAP centers provide?

(a) Indian LTAP centers provide transportation technology transfer services, including education, training, technical assistance and related support services to tribal governments and IRR Program participants. Indian LTAPs will:

- (1) Develop and expand tribal expertise in road and transportation areas;
- (2) Improve IRR Program performance;
- (3) Enhance tribal transportation planning, project selection, transit and freight programs;
- (4) Develop transportation training and technical resource materials and present workshops;
- (5) Improve tribal tourism and recreational travel programs;
- (6) Help tribes deal more effectively with transportation-related problems by developing and sharing tribal transportation technology and traffic safety systems and information with other transportation agencies;
- (7) Operate Indian technical centers in cooperation with State transportation departments and universities;
- (8) Provide technical assistance on transportation technology and enhance new technology implementation in cooperation with the private sector;
- (9) Develop educational programs to encourage and motivate interest in transportation careers among Native American students; and
- (10) Act as information clearinghouses for tribal governments and Indian-owned businesses on transportation-related topics.

(b) Unless otherwise stated in an Indian LTAP agreement, an Indian technical assistance program center must, at a minimum:

- (1) Maintain a current mailing list including, at a minimum, each tribe and IRR Program participant within the service area;
- (2) Publish a quarterly newsletter and maintain a Web site;
- (3) Conduct 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, Rural Technical Assistance Program (RTAP) centers, tribal governments, and local planning and transportation agencies to share and exchange publications, videotapes, training material, and conduct joint workshops;
- (9) Consult with tribes and IRR Program participants concerning technical assistance and training desired; and
- (10) Prepare an annual report and distribute this report to service area tribes.

§ 170.167 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 World Wide Web at the following address: <http://www.ltap.org>.

§ 170.168 Do Indian LTAP centers offer services similar to those of 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.

§ 170.169 What can a tribe do if Indian LTAP services are unsatisfactory?

A tribal government can address concerns over quality of services to the Indian LTAP Center Director, FHWA, and 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 and BIA or;
- (c) Services from other Indian LTAP centers.

§ 170.170 How are Indian LTAP centers managed?

(a) Each Indian LTAP center is managed by its Center Director and staff, with the advice of its technical panel under the Indian LTAP agreements. FHWA, BIA, and tribes review the performance of the Indian LTAP centers.

(b) Each Indian LTAP center has a technical panel consisting of one BIA Regional Road Engineer, one FHWA representative, one state DOT representative, and at least five tribal representatives from the service area. The technical panel 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.
- (c) The technical panel must meet at least twice a year. Tribal representatives may request IRR Program funding to cover the cost of participating in these committee meetings.

§ 170.171 How are tribal advisory technical panel members selected?

(a) The Indian LTAP center requests nominations from tribal governments and consortia within the service area for tribal transportation representatives to serve on the technical panel.

(b) Tribes from the service area select tribal panel members from those nominated.

Indian LTAP-Sponsored Education and Training Opportunities

§ 170.175 What Indian 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 BIA regional road engineer. Appendix B to this subpart contains a list of programs and funding sources.

§ 170.176 Where can tribes get scholarships and tuition for Indian LTAP-sponsored education and training?

Tribes can get tuition and scholarship assistance for Indian LTAP-sponsored education and training from the following sources:

- (a) Indian LTAP centers;
- (b) BIA-appropriated funds (for approved training); and
- (c) IRR Program 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. Coordinated technology implementation program (CTIP) projects.
- 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 § 170.156).

36. Indirect general and administrative costs; and

37. Other eligible activities described in this part.

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 highway bridges including bridges and structures under 20 feet in length, including the replacement of low-water crossings, regardless of length, with bridges.

2. Construction or reconstruction of IRR roads and bridges necessary to accommodate other transportation modes.

3. Construction of toll roads, highway 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 §§ 170.148 through 170.152 for additional information).

7. Engineered pavement overlays that add to the structural value and design life or increase 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 highway bridges.

12. Application of calcium magnesium acetate, sodium acetate/formate, or other environmentally acceptable, minimally corrosive anti-icing and de-icing compositions on highway bridges, and approaches thereto and other elevated structures.

13. Installation of scour countermeasures for highway 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 that 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.

18. Planning and development of rest areas, recreational trails, parking areas, sanitary facilities, water facilities, and other facilities that accommodate the traveling public.

19. Public approach roads and interchange ramps that 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 that 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. Safely accommodating the passage of vehicular and pedestrian traffic 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, kiosks, 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. (See §§ 170.123 through 170.124.)

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 transportation 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).

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, other than clause (xvi) listed in section 108(f)(1)(A) 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 §§ 170.135–170.138.

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 § 170.156).

67. Other eligible activities described in this part.

Appendix B to Subpart B—Sources of Tribal Transportation Training and Education Opportunities

The following is a list of some of the many governmental sources for tribal transportation training and education opportunities. There may be other non-governmental, tribal, or private sources not listed here.

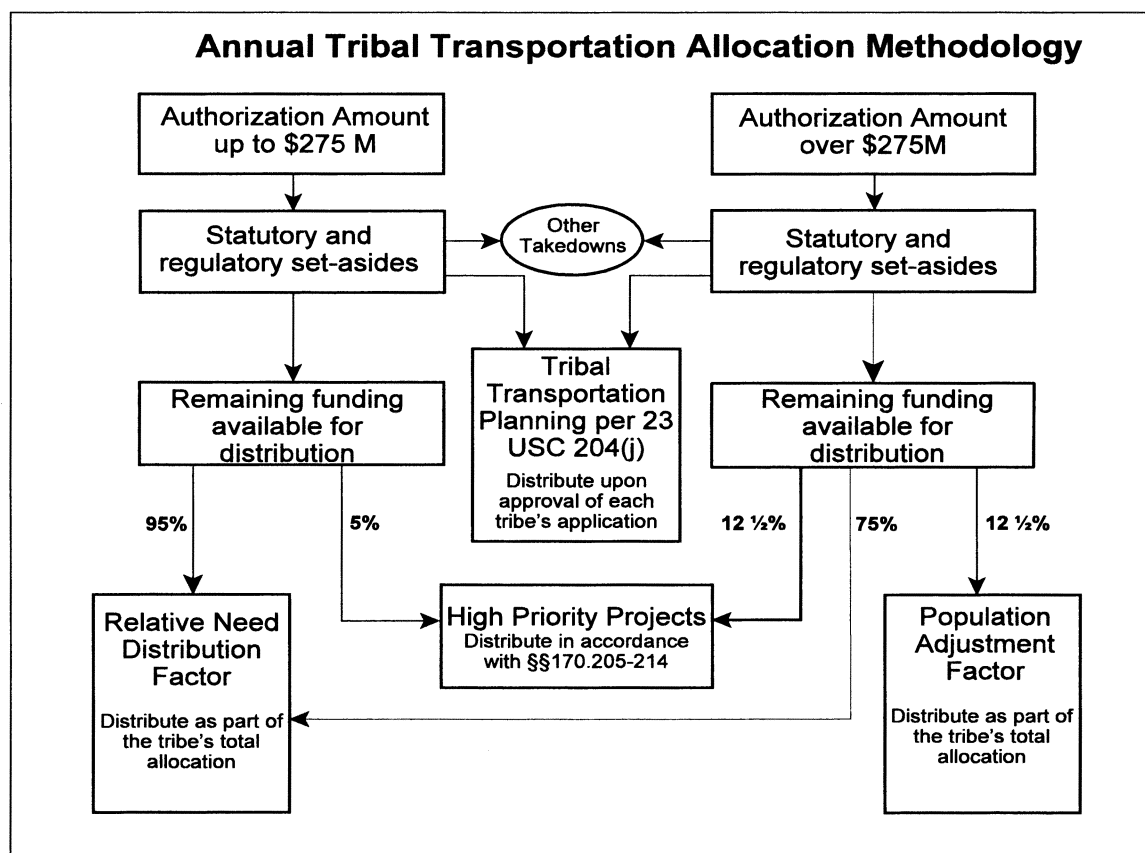
1. National Highway Institute training courses and fellowships
2. State and local technical assistance program workshops
3. Indian local technical assistance program workshops
4. FHWA and FTA Research Fellowships
5. Dwight David Eisenhower Transportation Fellowship (23 U.S.C. 504)
6. Intergovernmental personnel agreement assignments
7. BIA transportation cooperative education program
8. BIA force account operations
9. Federal Transit Administration workshops
10. State Departments of Transportation
11. Federal-aid highway construction and technology training including skill improvement programs under 23 U.S.C. 140 (b)(c)
12. Other funding sources identified in § 170.150 (Transit)
13. Department of Labor work force development
14. Indian Employment, Training, and Related Services Demonstration Act, Public Law 102–477
15. Garrett Morgan Scholarship (FHWA)
16. NTRC—National Transit Resource Center
17. CTER—Council for Tribal Employment Rights
18. BIA Indian Highway Safety Program
19. FHWA/STIPDG and NSTISS Student Internship Programs (Summer Transportation Internship Program for Diverse Groups and National Summer Transportation Institute for Secondary Students)
20. Environmental Protection Agency (EPA)
21. Department of Commerce (DOC)
22. Department of Housing and Urban Development Community Planning and Development

Subpart C—Indian Reservation Roads Program Funding

Tribal Transportation Allocation Methodology (TTAM)

§ 170.200 How does BIA allocate IRR Program funds?

This section sets forth the Tribal Transportation Allocation Methodology (TTAM) that BIA uses to allocate IRR Program funds. After appropriate statutory and regulatory set-asides, as well as other takedowns, the remaining funds are allocated as follows:



(a) A statutorily determined percentage to a tribal transportation planning program (under 23 U.S.C. 204(j)); and

(b) The remainder to a pool of funds designated as "Remaining funding available for distribution." This "Remaining funding available for distribution" pool is further allocated as follows:

(1) 5 percent to a discretionary pool for IRR High Priority Projects (IRRHPP); and

(2) 95 percent to pool for distribution by the following Relative Need Distribution Factor (RNDF) as defined in § 170.223:

(50 percent Cost to Construct + 30 percent Vehicle Miles Traveled + 20 percent Population)

(3) If the annual authorization is greater than \$275 million, then the amount above \$275 million, after appropriate statutory and regulatory set-asides, as well as other takedowns are applied, will be allocated as follows:

(i) 12.5 percent to the IRRHPP (§ 170.205);

(ii) 12.5 percent to the Population Adjustment Factor (PAF) (§ 170.220); and

(iii) 75 percent to the RNDF (§ 170.223).

§ 170.201 How does BIA allocate and distribute tribal transportation planning funds?

Upon request of a tribal government and approval by the BIA Regional Office, BIA allocates tribal transportation planning funds described in § 170.403 pro rata according to the tribes' relative need percentage from the RNDF described in § 170.223. The tribal transportation planning funds will be distributed in accordance with the BIA procedures for self-governance tribes that negotiate tribal transportation planning in their annual funding agreements and to BIA Regional Offices for all other tribes.

§ 170.202 Does the Relative Need Distribution Factor allocate funding among tribes?

Yes. The RNDF determines the amount of funding available to allocate to the tribes for their approved IRR projects and activities under 23 U.S.C. 202(d)(2). The IRR Program construction funds are allocated pro rata according to the tribes' relative need percentage from the Funding Formula.

(a) The IRR Program construction funds will be distributed in accordance with the BIA procedures for self-governance tribes that negotiate IRR construction projects into their AFA,

and distributed to BIA Regional Offices for all other tribes.

(b) In order for a tribe's IRR Program 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)

§ 170.205 What is an IRR High Priority Project (IRRHPP)?

(a) The IRRHPP is a special funding pool that can be used:

(1) By a tribe whose annual allocation is insufficient to complete its highest priority project;

(2) By a governmental subdivision of a tribe that is authorized to administer the tribe's IRR Program funding and whose annual allocation is insufficient to complete its highest priority project; or

(3) By any tribe for an emergency/disaster on any IRR transportation facility.

(b) Eligible applicants may have only one IRRHPP application pending at any time. This includes emergency/disaster applications.

(c) IRRHPP funds cannot be used for transportation planning, research, routine maintenance activities, and items listed in § 170.116.

§ 170.206 How is an emergency/disaster defined?

(a) An emergency/disaster is damage to an IRR transportation facility that:

(1) Renders the facility impassable or unusable; and

(2) Is caused by either a natural disaster over a widespread area or catastrophic failure from an external cause.

(b) Some examples of natural disasters are: floods, droughts, earthquakes, tornadoes, landslides, avalanches, and severe storms.

(c) An example of a catastrophic failure is the collapse of a highway bridge after being struck by a barge, truck, or landslide.

§ 170.207 What is the intent of IRRHPP emergency/disaster funding?

The intent of IRRHPP emergency/disaster funding is to provide funding for a project that contains eligible work and would be approved for FHWA-ERFO Program funding except that the disaster dollar threshold for eligibility in the FHWA-ERFO program has not been met. Applicants are encouraged to apply for FHWA-ERFO Program funding if the project meets the requirements of the program.

§ 170.208 What funding is available for IRRHPP?

The IRRHPP funding level (see chart in § 170.200) for the year is:

(a) Authorization Amount up to \$275 million—5 percent of the pool of funds designated as “Remaining funding available for distribution”; plus

(b) Authorization Amount over \$275 million—12.5 percent of the amount above \$275 million after appropriate statutory and regulatory set-asides, as well as other takedowns.

§ 170.209 How will IRRHPP applications be ranked and funded?

(a) BIADOT and the Federal Lands Highway (FLH) Program office will determine eligibility and fund IRRHPP applications subject to availability of funds and the following criteria:

(1) Existence of safety hazards with documented fatality and injury accidents;

(2) Number of years since the tribe's last IRR Program construction project completed;

(3) Readiness to proceed to construction or IRRBP design need;

(4) Percentage of project cost matched by other non-IRR Program 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.

(b) Funding is limited to the estimated cost of repairing damage to the IRR transportation facility up to a maximum of \$1 million per application.

(c) A project submitted as an emergency/disaster must be at least 10 percent of a tribe's relative need distribution.

(d) BIA's regional roads engineer or the tribe, if it has plans, specifications, and estimates (PS&E) approval authority will certify the cost estimate in approving the plans, specifications, and estimates for the IRRHPP.

(e) The Project Scoring Matrix is found in appendix A to subpart C.

§ 170.210 How may a tribe apply for IRRHPP?

A tribe may apply for IRRHPP funds by submitting a complete application to BIADOT. The application must include:

(a) Project scope of work (deliverables, budget breakdown, timeline);

(b) Amount of IRRHPP funds requested;

(c) Project information addressing ranking criteria identified in § 170.209, or the nature of the emergency/disaster;

(d) Documentation that the project meets the definition of an IRR transportation facility and is in the IRR Inventory;

(e) Documentation of official tribal action requesting the IRRHPP project; and

(f) Documentation from the tribe providing authority for BIA to place the project on an IRRHPP TIP if the project is selected and approved.

§ 170.211 What is the IRRHPP Funding Priority List?

The IRRHPP Funding Priority List (FPL) is the ranked IRRHPPs approved for funding under § 170.209.

(a) The number of projects on the FPL is limited by the amount of IRRHPP funds available at the beginning of the fiscal year.

(b) BIA will place all projects on the FPL on an IRRHPP TIP and forward them to FHWA for approval.

§ 170.212 What is the timeline for IRRHPPs?

(a) BIA will accept IRRHPP applications until December 31 each year for projects during the following year. BIA processes IRRHPP applications as shown in the following table:

By . . .	BIA will . . .
(1) January 31	Notify all applicants and Regions in writing of acceptance of applications.
(2) March 31	Coordinate with FLH to rank all accepted applications in accordance with Appendix A to Subpart C, develop the FPL, and return unaccepted applications to the applicant with an explanation of the deficiencies.
(3) April 15	Notify all accepted applicants of the projects included on the FPL.
(4) May 15	Distribute funds to BIA Regions or in accordance with procedures of the Office of Self-Governance for selected IRRHPP.

(b) If total funding for accepted projects does not equal the total funds available for IRRHPP, the remaining funds will be redistributed by the Relative Need Distribution Factor in accordance with Appendix C to subpart C.

(c) All IRRHPP funds must be obligated on or before August 15. If it is anticipated that these funds cannot be obligated by the end of the fiscal year,

IRRHPP funds assigned to an approved project must be returned to FHWA by August 1. BIA will redistribute these funds the following fiscal year to those approved projects. (See § 170.213.)

§ 170.213 How long are IRRHPP funds available for a project?

Any project not under contract for construction within 3 fiscal years of its initial listing on an FPL will forfeit its

unexpended funding. Applicants may request, in writing, a one-time, 1-year extension of this deadline from BIA. Upon completion of an IRRHPP, funds that are reserved but not expended are to be recovered and returned to the IRRHPP funding pool.

§ 170.214 How does award of an emergency/disaster project affect projects on the FPL?

(a) A tribe may submit an emergency/disaster project any time during the fiscal year. BIA considers these projects a priority and funds them as follows:

(1) If a tribe submits a project before the issuance of the FPL and it is determined as eligible for IRRHPP funds, BIA will provide funding before providing funding for the other approved projects on the FPL; or

(2) If a tribe submits a project after the issuance of the FPL and the distribution of the IRRHPP funds, BIA will provide funding when funds provided to the FPL projects is returned to BIA due to their inability to be obligated. (See § 170.212(c).)

(b) If BIA uses funding previously designated for a project on the FPL to fund a emergency/disaster project, the FPL project that lost its funding will move to the top of the FPL for the following year.

Population Adjustment Factor

§ 170.220 What is the Population Adjustment Factor?

The Population Adjustment Factor (PAF) is a special portion of the total IRR Program distribution calculated annually that provides for broader participation in the IRR Program by tribes (or a governmental subdivision of a tribe authorized to administer the tribe's IRR Program funding). The PAF is based upon the population ranges and distribution factors in appendix B to subpart C. The population data used is the American Indian and Alaska Native Service Population developed by the Department of Housing and Urban Development, under the Native American Housing Assistance and Self-Determination Act (NAHASDA), (25 U.S.C. 4101 *et seq.*). Appendix B to subpart C explains how the PAF is derived. The funds generated by the PAF can be used for transportation planning or IRR projects.

§ 170.221 What funding is available for distribution using the PAF?

When the annual authorization for the IRR Program is greater than \$275 million, 12.5 percent of the amount above \$275 million after the appropriate statutory and regulatory set-asides, as well as other takedowns, is available for distribution using the PAF.

Relative Need Distribution Factor

§ 170.223 What is the Relative Need Distribution Factor (RNDF)?

The Relative Need Distribution Factor (RNDF) is a mathematical formula used for distributing the IRR Program

construction funds. The RNDF is derived from a combination of the cost to construct, vehicle miles traveled, and population. Appendix C to subpart C explains how the RNDF is derived and applied.

IRR Inventory and Long-Range Transportation Planning (LRTP)

§ 170.225 How does the LRTP process relate to the IRR Inventory?

The LRTP process (see subpart D) is a uniform process that identifies the transportation needs and priorities of the tribes. The IRR Inventory is derived from transportation facilities identified through LRTP. It is also a means for identifying projects for the IRRHPP Program.

§ 170.226 How will this part affect the IRR Inventory?

The IRR Inventory defined in this part will expand the IRR Inventory for funding purposes to include:

(a) All roads, highway bridges, and other eligible transportation facilities that were previously approved in the BIA Road System in 1992 and each following year;

(b) All Indian reservation roads constructed using Highway Trust funds since 1983;

(c) All designated IRR routes (25 CFR 170.442–170.444);

(d) Non-road transportation related facilities; and

(e) Other applicable IRR transportation facilities.

§ 170.227 How does BIA develop and use the IRR Inventory?

The IRR Inventory as defined in § 170.442 identifies the transportation need by providing the data that BIA uses to generate the Cost to Construct (CTC) and Vehicle Miles Traveled (VMT) components of RNDF. The IRR Inventory is developed through the LRTP process, as described in §§ 170.410 through 170.415. BIA Regional offices maintain, certify, and enter the data for their region's portion of the IRR Inventory database. Only project-specific transportation activities are included in the IRR Inventory.

§ 170.228 Are all facilities included in the IRR Inventory used to calculate CTC?

No. Projects/facilities proposed to receive construction funds on an approved IRR TIP are not eligible for future inclusion in the calculation of the CTC portion of the formula for a period of 5 years thereafter.

General Data Appeals

§ 170.231 May a tribe challenge the data BIA uses in the RNDF?

(a) A tribe may submit a request to the BIA Regional Director to revise the data for the tribe that BIA uses in the RNDF. The request must include the tribe's data and written support for its contention that the tribal data is more accurate than BIA's.

(b) 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.

(c) The BIA Regional Director must respond within 30 days of receiving a data correction request under this section.

(1) Unless the BIA Regional Director determines that the existing BIA data is more accurate, the BIA Regional Director must approve the tribe's data correction request and accept the tribe's corrected data.

(2) If the BIA Regional Director disapproves the tribe's request, the decision must include a detailed written explanation of the reasons for the disapproval, copies of any supporting documentation (other than the tribe's request) that the BIA Regional Director relied upon in reaching the decision, and notice of the tribe's right to appeal the decision.

(3) If the BIA Regional Director does not approve the tribe's request within 30 days of receiving the request, the request must be deemed disapproved.

§ 170.232 How does a tribe appeal a disapproval from the BIA Regional Director?

(a) Within 30 days of receiving a disapproval, or within 30 days of a disapproval by non-action of the BIA Regional Director, a tribe may file a written notice of appeal to the Director, Bureau of Indian Affairs, with a copy provided to the BIA Regional Director; and

(b) Within 30 days of receiving an appeal, the Director, Bureau of Indian Affairs must issue a written decision upholding or reversing the BIA Regional Director's disapproval. This decision must include a detailed written explanation of the reasons for the disapproval, copies of any supporting documentation that the Director, Bureau of Indian Affairs 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 under 25 CFR part 2.

Flexible Financing**§ 170.300 May tribes use flexible financing to finance IRR transportation projects?**

Yes. Tribes may use flexible financing in the same manner as States to finance IRR transportation projects, unless otherwise prohibited by law.

(a) Tribes may issue bonds or enter into other debt financing instruments under 23 U.S.C. 122 with the expectation of payment of IRR Program funds to satisfy the instruments.

(b) Under 23 U.S.C. 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.

(c) Tribes may use IRR Program funds as collateral for loans or bonds to finance IRR projects. Upon the request of a tribe, a BIA region will provide necessary documentation to banks and other financial institutions.

170.301 Can a tribe use IRR Program funds to leverage other funds or pay back loans?

(a) A tribe can use IRR Program funds to leverage other funds.

(b) A tribe can use IRR Program funds to pay back loans or other finance instruments for a project that:

(1) The tribe paid for in advance of the current year using non-IRR Program funds; and

(2) Was included in FHWA-approved IRR TIP.

170.302 Can BIA regional offices borrow IRR Program funds from each other?

Yes. A BIA Regional office, in consultation with tribes, may enter into

agreements to borrow IRR Program funds to assist another BIA regional office in financing the completion of an IRR project. These funds must be repaid within the next fiscal year. These agreements cannot be executed during the last year of a transportation authorization act unless Congress has authorized IRR Program funds for the next year.

§ 170.303 Can a tribe apply for loans or credit from a State infrastructure bank?

Yes. Upon the request of a tribe, 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
Accident and fatality rate for candidate route ¹ .	Severe	X	Moderate	Minimal	No accidents.
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.
Readiness to Proceed to Construction or IRRBP Design Need.	PS&E Complete and approved.	Bridge Replacement PS&E development Project.	Bridge Rehabilitation PS&E development Project.	Non-bridge PS & E development Project.	X.
Percentage of Project matched by other funds.	X	80 percent or more by other funds.	20–79 percent by other funds.	1–19 percent	No other funds.
Amount of funds requested ² .	X	250,000 or less	250,001–500,000	500,001–750,000	Over 750,000.
Geographic isolation	No external access to community.	Substandard Primary access to community.	Substandard Secondary access to community.	Substandard access to tribal facility.	X.
All weather access for:	Addresses all 6 elements	Addresses 4 or 5 elements.	Addresses 3 elements	Addresses 2 elements	Addresses 1 element.
—Employment					
—Commerce					
—Health					
—Safety					
—Educational Resources					
—Housing					

¹ National Highway Traffic Safety Board standards.

² Total funds requested, including preliminary engineering, construction, and construction engineering.

Appendix B to Subpart C—Population Adjustment Factor

1. The Population Adjustment Factor allows for participation in the IRR Program

by all tribes. This component of the funding formula creates a special calculation of funding which is available in accordance with the TTAM each fiscal year for a tribe

based on the population range within which the tribe is included. The following table shows how BIA develops the PAF.

Population range	Distribution factor*	Number of tribes**	Funding amount per tribe
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
10,001+	8	N ₅	MBA × 8

* Multiplier used to determine the PAF funding for 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.

** The number of tribes changes yearly.

*** The Minimum Base Allocation (MBA) is the dollar value to be multiplied by the distribution factor for each population range to determine the distribution of the PAF.

2. The following example shows how the PAF applies to a total IRR Program authorization for the allocation year of \$375 million. The five steps to calculate the Population Adjustment Factor are applied as follows:

Step 1. For each population range, multiply the Distribution Factor by the total

number of tribes identified in the population range to determine the Step Factor;

Step 2. Add the Step Factors determined in Step 1 above to derive a Total Step Factor;

Step 3. Calculate the \$A = IRR Program authorization available in the allocation year by taking the Total IRR Program authorization for the allocation year (\$375M for this example) minus the appropriate

statutory and regulatory set-asides, as well as other takedowns (\$25M for this example)

\$375M – \$25M = \$350M;

Step 4. Derive a Minimum Base Allocation by taking 12½ per cent of the difference (from Step 3) and dividing it by the Total Step Factor. The mathematical equation for the Base Allocation is as follows:

$$MBA = \left(\frac{12\frac{1}{2}\% \times (\$A - \$275M)}{(N_1 + 3.5N_2 + 5N_3 + 6.5N_4 + 8N_5)} \right)$$

MBA = Minimum Base Allocation
Distribution Factors = 1, 3.5, 5, 6.5, and 8
\$A = IRR Program Authorization Available in the Allocation Year

\$275M = Base Reference Amount

n = The nth Population Range

1 . . . 5 = Population Ranges 1 through 5

N_n = Number of tribes in the nth Population Range

For the example above, the formula yields:

$$MBA = \frac{12\frac{1}{2}\% \times (\$350M - \$275M)}{17 + 3.5(66) + 5(309) + 6.5(137) + 8(29)} = \frac{\$9,375,000}{2,915.50} = \$3,215.57$$

Step 5. Calculate Population Adjustment Factor within each Population Range by multiplying the Distribution Factor for the Population Range by the Minimum Base Allocation.

The mathematical equation for the Population Adjustment Factor calculation is as follows:

PAF_n = DF_n X MBA

Where:

PAF = Population Adjustment Factor

DF = Distribution Factor

n = The nth Population Range

MBA = Minimum Base Allocation

For example, for DF₁ = 1.00; PAF₁ = 1 × \$3,215.57 = \$3,215.57

For example, for DF₃ = 5.00; PAF₃ = 5 × \$3,215.57 = \$16,077.86

The following table illustrates the results of the above calculations for all population ranges:

Population range (step)	# of tribes	Distribution factor	Step factor	Tribal PAF per population range	Total funding per step
Less than 25	17	1	17	\$3,215.57	\$54,664.72
25–100	66	3.5	231	11,254.50	742,797.12
101–1000	309	5	1545	16,077.36	4,968,058.65
1001–10,000	137	6.5	890.50	20,901.22	2,863,466.82
10,001 +	29	8	232	25,724.58	746,012.69
Totals		Total Step Factor = 2,915.50			9,375,000

Appendix C to Subpart C—Relative Need Distribution Factor

The Relative Need Distribution Factor (RNDF) is a mathematical formula for

distributing the IRR Program construction funds using the following three factors: Cost to Construct (CTC), Vehicle Miles Traveled (VMT), and Population (POP).

1. What Is the Formula for the RNDF?

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 = percent 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 for all tribes 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

$$A = 0.50 [CTC \div \text{Total CTC}] + 0.30[VMT \div \text{Total VMT}] + 0.20[POP \div \text{Total POP}]$$

$$A = 0.50 [51,583,000 \div 10,654,171,742] + 0.30 [45,680 \div 10,605,298] + 0.20 [4,637 \div 1,010,236]$$

$$A = 0.00242 + 0.00129 + 0.00092$$

$$A = 0.00463 \text{ or } 0.463 \text{ percent}$$

If IRR Program construction funds available for the fiscal year are \$226,065,139
Then the allocation amount would be: $\$226,065,139 \times 0.00463 = \$1,046,682$.

2. How Does BIA Estimate Construction Costs?

The methodology for calculating the Cost to Construct is explained in Appendix D of this subpart.

3. What Is the Cost to Construct for an Individual Tribe?

The Cost to Construct for an individual tribe is the sum of all eligible and approved project costs from the tribe's IRR Inventory.

4. What Is the Cost to Construct Component in the RNDF?

The Cost to Construct component is the total estimated cost of a tribe's transportation projects as a percentage of the total estimated cost nationally of all tribes' transportation facilities. Costs are derived from the IRR inventory of eligible IRR transportation facilities developed and approved by BIA and tribal governments through Long-Range Transportation Planning.

5. May the Cost to Construct Component of the RNDF Be Modified?

Yes, BIA and FHWA, with input and recommendations provided by the IRR Program Coordinating Committee, may consider revisions to the data elements used in calculating the Cost to Construct component.

6. What Is the Source of the Construction Cost Used To Generate the CTC?

(a) The construction cost will be derived from the average of the following three project bid tabulation sources:

(1) Tribal bid tabulations or local BIA bid tabulations;

(2) State bid tabulations for the region of the State in which the tribe's project will be constructed;

(3) National IRR Program bid tabulations.

(b) If one or more of these bid tabulation sources is unavailable, use the average of the available sources.

(c) BIADOT will collect the national IRR Program bid tabulation data and enter it into the Cost to Construct database.

7. What Is the VMT Component and How Is It Calculated?

VMT is a measure of the current IRR transportation system use. BIA calculates VMT using the sum of the length of IRR route segments in miles multiplied by the Average Daily Traffic (ADT) of the route segment.

8. What IRR Route Sections Does BIA Use To Calculate VMT?

All IRR route sections in the IRR Inventory are used to calculate VMT, but percentage factors are applied in accordance with Appendix C to subpart C, question (10).

9. What Is the Population Component and How Is It Determined?

The population component is a factor used to define a portion of transportation need based on the number of American Indian or Alaska Native people served. The population data used will be the American Indian and

Alaska Native Service Population developed by the Department of Housing and Urban Development, under the Native American Housing Assistance and Self-Determination Act (NAHASDA), (25 U.S.C. 4101 *et seq.*).

10. Do All IRR Transportation Facilities in the IRR Inventory Count at 100 Percent of Their CTC and VMT?

No. The CTC and VMT must be computed at the non-Federal share requirement for matching funds for any transportation facility that is added to the IRR inventory and is eligible for funding for construction or reconstruction with Federal funds, other than Federal Lands Highway Program funds.

However, if a facility falls into one or more of the following categories, then the CTC and VMT factors must be computed at 100 percent:

(1) The transportation facility was approved, included, and funded at 100 percent of CTC and VMT in the IRR Inventory for funding purposes prior to the issuance of these regulations.

(2) The facility is not eligible for funding for construction or reconstruction with Federal funds, other than Federal Lands Highway Program funds; or

(3) The facility is eligible for funding for construction or reconstruction with Federal funds, however, the public authority responsible for maintenance of the facility provides certification of maintenance responsibility and its inability to provide funding for the project.

Appendix D to Subpart C—Cost To Construct

Cost to Construct

(Appendix D includes Tables 1–8 which BIA Division of Transportation developed based on internal IRR data and the negotiated rulemaking process.) This method utilizes the concepts of the Bureau of Indian Affairs' "Simplified Approach to Compute the Cost to Construct". The concept has been modified to include computing costs for High Capacity Roads (multi-lane roads), non-road projects (snowmobile trails, boardwalks, footpaths, etc.) and other eligible transportation facility projects.

The theory behind this concept is based on the procedure that information gathered during any inventory update can be used to compare the existing conditions to defined Adequate Standard Characteristics. This comparison can then be used to determine the total cost required to bring the transportation facility road up to a necessary Adequate Standard. The IRR Inventory database is used to determine the costs of a new transportation facility or in the case of an existing facility, the costs that will be necessary to improve the facility from its existing condition to an adequate standard. Therefore, the Cost to Construct for a particular facility is the cost required to improve the facility's existing condition to a condition that would meet the Adequate Standard Characteristics (see Table 1). For roadways, the recommended design of the

geometrics and surface type vary based on the road's functional classification and average daily traffic and will use four categories of cost. The four categories are Grade and Drain Costs, Aggregate Costs, Pavement Costs, and Incidental Costs. For bridges, costs are derived from costs in the National Bridge Inventory as well as the National Bridge Construction unit cost data developed by FHWA. For other transportation IRR transportation facilities, an inventory of needs must be developed with associated costs for new and existing IRR transportation facilities based on long range transportation planning. The BIA Regions and tribes must ensure the IRR Inventory is sufficiently updated to provide all the necessary information indicating the need, the condition and the construction cost data to compute the cost to construct of any proposed or existing facility.

Basic Procedures

The IRR Inventory, based on transportation planning must be developed for those tribes without data and updated for those tribes that have an existing IRR Inventory. Once the IRR Inventory database is current and all IRR transportation facilities needs are identified and verified, the Cost to Construct for those IRR transportation facilities can be developed.

The procedure for determining the cost to construct of a proposed transportation facility is computed through the following step-by-step process:

(a) Determine the Future ADT of the transportation facility as applicable, based upon tribal transportation planning or set default future ADT (see Table 2);

(b) Determine the Class of transportation facility *e.g.*, rural local, rural major collector, or other transportation facility, utilizing future ADT and based upon tribal transportation planning (see Table 1);

(c) Identify, if appropriate, transportation facility terrain as flat, rolling, or mountainous;

(d) Set Adequate Standard based on Class, and/or future ADT, and Terrain (see Table 1);

(e) Identify the transportation facility's construction cost per unit (*e.g.*, cost per mile, cost per linear foot) for the applicable components of construction: Aggregate, Paving, Grade/Drain, Incidental, or other costs associated with the transportation facility;

(f) Multiply the construction cost per unit for each component of construction by the length of the proposed road or other appropriate unit of the transportation facility to determine the cost for each component of construction; and

(g) Calculate the cost for the proposed road or transportation facility by adding together the costs for each component of construction.

The procedure for determining the cost to reconstruct or rehabilitate an existing transportation facility is determined in the same manner as a proposed transportation facility, except that the existing condition of the project is evaluated to determine the

remaining percentage of cost of each applicable component of construction that will be included in the cost for reconstruction. The steps are:

(1) Evaluate existing condition of road or transportation facility in accordance with applicable management systems, guidelines or other requirements;

(2) Identify the percentage of required cost for each component of applicable construction costs for the transportation facility by determining the Adequate Standards Characteristics (see Table 1) and existing condition of the transportation facility and by applying the applicable percent cost requirement tables for aggregate, paving, grade/drain, incidental, and bridge (see Tables 4–8);

(3) Multiply the construction cost per unit for each component of construction by the corresponding percent of cost required (see Tables 4–8) and by the length of the road or other appropriate unit of the transportation facility to determine the reconstruction cost for each component; and

(4) Calculate the reconstruction cost for the road or transportation facility by adding together the reconstruction costs for each component of construction.

Average daily traffic (ADT) is acquired through actual traffic counts on the roadway sections. Where current ADT is practical to acquire, it should be acquired and future ADT calculated by projecting the current ADT at 2 percent per year for 20 years. If the road is proposed, the ADT impractical to acquire, or a current ADT does not exist, then BIA will assign a default current ADT and calculate future ADT by projecting the default current ADT at 2 percent per year for 20 years to form the basis of the Adequate Standard (see Table 1). Table 2 summarizes the default current and default future ADT by class of road.

Functional Classification: 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 classification is used to delineate the difference between the various road and/or intermodal transportation facility standards eligible for funding under the IRR Program. As a part of the IRR Inventory

system management, all IRR transportation facilities included on or added to the IRR Inventory must be classified according to the following functional classifications:

(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:* Rural 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 that 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 that are located within communities serving residential areas.

(d) *Class 4:* Rural Major Collector Road is a collector to rural local roads.

(e) *Class 5:* Rural Local Road that is either a section line and/or stub type roads that 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 use purposes.

(f) *Class 6:* City Minor Arterial Streets that are located within communities, and serve as access to major arterials.

(g) *Class 7:* City Collector Streets that are located within communities and serve as collectors to the city local streets.

(h) *Class 8:* This classification encompasses all non-road projects such as paths, trails, walkways, or other designated types of routes for public use by foot traffic, bicycles, trail bikes, snowmobile, all terrain vehicles or other uses to provide for the general access of non-vehicular traffic.

(i) *Class 9:* This classification encompasses other transportation facilities such as public parking facilities adjacent to IRR routes and

scenic byways, rest areas, and other scenic pullouts, ferry boat terminals, and transit terminals.

(j) *Class 10:* This classification encompasses airstrips that 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.

(k) *Class 11:* This classification indicates an overlapping of a previously inventoried section or sections of a route and is used to indicate that it is not to be used for accumulating needs data. This class is used for reporting and identification purposes only.

Construction Need: All existing and proposed transportation facilities in the IRR Inventory must have a Construction Need (CN) which is used in the Cost to Construct calculations. These transportation facilities are assigned a CN by the tribe during the long-range transportation planning and inventory update process using certain guidelines which are: Ownership or responsibility of the facility, whether it is within or provides access to reservations, groups, villages and communities in which the majority of the residents are Indian, and whether it is vital to the economic development of Indian tribes. As part of the IRR Inventory management, all facilities included on or added to the IRR Inventory must be designated a CN which are defined as follows:

(a) *Construction Need 0:* Transportation facilities which have been improved to their acceptable standard or projects/facilities proposed to receive construction funds on an approved IRR TIP are not eligible for future inclusion in the calculation of the CTC portion of the formula for a period of 5 years thereafter.

(b) *Construction Need 1:* Existing BIA roads needing improvement.

(c) *Construction Need 2:* Construction need other than BIA roads needing improvement.

(d) *Construction Need 3:* Substandard or other roads for which no improvements are planned, maintenance only.

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

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TABLE 1 - ADEQUATE STANDARD CHARACTERISTICS

The cost to construct of a particular transportation facility is defined as the cost required to improve the transportation facility from its existing condition to a condition that would meet the Adequate Standard Characteristics. Table 1 presents the Adequate Standard Characteristics.

ADEQUATE STANDARD NUMBER	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
TERRAIN**	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)(2)(3)	(1)	(2)	(3)	(1)	(2)	(3)	N/A	N/A	N/A	N/A	N/A	N/A
FUTURE ADT used in ADS assignment	N/A	N/A	FADT<400	FADT>=400	FADT>=400	FADT<400	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
BIA CLASS	1	MAJOR ARTERIAL	2	RURAL MINOR ARTERIALS	4	RURAL MAJOR COLLECTOR	5	RURAL LOCAL	6	CITY MINOR ARTERIAL	7	CITY COLLECTOR	3*	MOTORIZED/ NON-MOTORIZED TRAILS	8	OTHER TRANSPORTATION FACILITIES	9	10	11	Overlap ing AIRSTRIPS	Routes
CALCULATED VALUES																					
FUTURE SURFACE TYPE (EXISTING)	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	FADT UNDER 50 - EARTH FADT 50-250 - GRAVEL FADT OVER 250 - PAVED	FADT UNDER 50 - EARTH FADT 50-250 - GRAVEL FADT OVER 250 - PAVED	DEPENDS ON FACILITY	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FUTURE SURFACE TYPE (PROPOSED)	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	FADT UNDER 50 - EARTH FADT 50-250 - GRAVEL FADT OVER 250 - PAVED	FADT UNDER 50 - EARTH FADT 50-250 - GRAVEL FADT OVER 250 - PAVED	DEPENDS ON FACILITY	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
DEFAULT CURRENT ADT /DEFAULT FUTURE ADT**	must exist	ADT 100 FADT 149	ADT 100 FADT 149	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 50 FADT 74	ADT 20 FADT 30	ADT 25 FADT 37	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
RECOMMENDED DESIGN																					
MINIMUM ROADWAY WIDTH (INCLUDING SHOULDERS)	66'	36'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'	32'
SHOULDER WIDTH	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'	6'
SHOULDER TYPE	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED	PAVED
* Local Class 3 roads may be earth, gravel or paved, depending on tribal customs, economics, or environmental considerations. ** Use default future ADT for proposed roads or where impractical to acquire ADT or ADT does not exist. (See Table 2 Default ADT and Default Future ADT). Where current ADT is practical to acquire, it should be acquired and projected to a future ADT at 2 per cent per year for 20 years. *** (1)=Flat; (2)=Rolling; (3)=Mountainous																					

Table 2.—Default Current ADT and Default Future ADT

Table 2 summarizes the default current and default future ADT by class of road. Default future ADT is calculated by projecting default current ADT at 2 percent per year for 20 years. 2 percent per year for 20 years yields a factor of 1.485.

TABLE 2.—DEFAULT CURRENT ADT AND DEFAULT FUTURE ADT

IRR Class No.	Default current and default future ADT*
1	N/A, Must Exist
2	100 * 1.485 = 149
3	25 * 1.485 = 37

TABLE 2.—DEFAULT CURRENT ADT AND DEFAULT FUTURE ADT—Continued

IRR Class No.	Default current and default future ADT*
4	50 * 1.485 = 74
5	50 * 1.485 = 74
6	50 * 1.485 = 74
7	50 * 1.485 = 74
8	20 * 1.485 = 30
9	N/A**
10	N/A**
11	N/A**

* Default Future ADT is used for proposed roads or when impractical to acquire current ADT or when current ADT does not exist.

** Class 9, 10, and 11 are point features in the inventory and do not have an ADT. All multiplication is rounded.

Table 3.—Future Surface Type

Table 3 summarizes all possible scenarios of the future surface type either required or based on the various future ADT thresholds for each type or class of road in the inventory.

TABLE 3.—FUTURE SURFACE TYPE

Const. need	IRR class No.	Future ADT	Future surface type
0,1,2,3	1	Any	Paved
0,1,2,3	2	Any	Paved
0,1,2,3	3,6,7	< 50	Earth
		50 – 250 ...	Gravel
		> 250	Paved
0,1,2,3	4,5	< 50	Earth
		50 – 250 ...	Gravel
		> 250	Paved
0,1,2,3,4	8	N/A	N/A*
0,1,2,3,4	9	N/A	N/A**
0,1,2,3,4	10	N/A	N/A***
4***	1	N/A****	N/A****
4	2	ANY	Paved
4	3,6,7	< 50	Earth
		50 – 250 ...	Gravel
		> 250	Paved
4	4	< 50	Earth
		50 – 250 ...	Gravel
		> 250	Paved
4	5	< 50	Earth
		50 – 250 ...	Gravel
		> 250	Paved

* Class 8 does not have a future surface type. Per mile costs are applied independent of future surface type.

** Class 9 does not have a future surface type. Costs are independent of future surface type.

*** Class 10 does not have a future surface type. These are airstrips and is used for identification purposed only.

**** Class 1 with Construction Need of 4 does not apply. Class 1 roads must exist.

Table 4.—Percent of Grade and Drain Cost Required

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 4 summarizes the percentage of grade and drain costs required based on the existing roadbed condition observed in an inventory update.

TABLE 4.—PERCENT OF GRADE AND DRAIN COST REQUIRED

Code	Roadbed condition	Percent grade and drain cost required (Percent)
0	Proposed Road	100
1	Primitive Trail	100
2	Bladed Unimproved Earth Road, Poor Drainage, Poor Alignment	100
3	Minimum Built-up Roadbed (Shallow cuts and fills) with inadequate drainage and alignment that generally follows existing ground.	100
4	A designed and constructed roadbed with some drainage and alignment improvements required.	100

TABLE 4.—PERCENT OF GRADE AND DRAIN COST REQUIRED—Continued

Code	Roadbed condition	Percent grade and drain cost required (Percent)
5	A roadbed constructed to the adequate standards with good horizontal and vertical alignment and proper drainage.	0
6	A roadbed constructed to adequate standards with curb and gutter on one side	0
7	A roadbed constructed to adequate standards with curb and gutter on both sides	0

Table 5.—Percent of Aggregate Surface Cost Required

Table 5 summarizes the percentage of aggregate surface costs required based on all

possible scenarios of existing surface type conditions and calculated future surface type.

TABLE 5.—PERCENT OF AGGREGATE SURFACE COST REQUIRED

Existing surface type	Future surface type		
	Paved (percent)	Gravel (percent)	Earth (percent)
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 Surface Condition Index (SCI) is 40 or less indicating that reconstruction will be required, then 100 percent of the aggregate cost will be required. If greater than 40, then none of the aggregate cost will be applied.

Table 6.—Percent of Pavement Surface Cost Required

Table 6 Summarizes the percentage of pavement surface costs for existing

conditions required based on all possible scenarios of existing surface type conditions and calculated future surface type. Pavement

overlays are calculated at 100 percent of the pavement costs.

TABLE 6.—PERCENT OF PAVEMENT SURFACE COST REQUIRED

Existing surface type	Future surface type		
	Paved (percent)	Gravel (percent)	Earth (percent)
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 Surface Condition Index (SCI) is 60 or less indicating that reconstruction will be required, then 100 percent of the aggregate cost will be required. If greater than 60, then none of the aggregate cost will be applied.

Table 7.—Percent of Incidental Construction Cost Required

Incidental cost items are generally required if a project includes construction or reconstruction of the roadbed. Some incidental items are included in all road improvement projects, while others are only required for specific projects. Table 7 summarizes the incidental construction

determination estimating procedure for each of the Roadbed Category Codes. As shown in Table 4, roadbed condition codes 0 through 2 will require 65 percent of the incidental costs for construction because they generally will not require maintenance of traffic during construction. If maintenance of traffic is required as will generally be the case for roadbed condition codes 3 and 4, the minimum percentage of incidental costs for

these roadbed condition codes will be 75 percent. It is assumed that improvement roadbed condition codes 5, 6 and 7 will primarily be paving projects with little or no earthwork involved and the minimum percentage of the total incidental construction cost for these projects will be 30 percent.

TABLE 7.—PERCENT OF INCIDENTAL CONSTRUCTION COST REQUIRED

Code	Roadbed condition	New alignment (percent)	Maintenance of traffic required (percent)
0	Proposed road	65	N/A
1	Primitive trail	65	N/A
2	Bladed unimproved earth road, poor drainage, poor alignment	65	N/A
3	Minimum built-up roadbed (shallow cuts and fills) with inadequate drainage and alignment that generally follows existing ground.	N/A	75
4	A designed and constructed roadbed with some drainage and alignment improvements required.	N/A	75
5	A roadbed constructed to the adequate standards with good horizontal and vertical alignment and proper drainage. Requiring surfacing.	N/A	30
6	A roadbed constructed to adequate standards with curb and gutter on one side. Requiring surfacing.	N/A	30
7	A roadbed constructed to adequate standards with curb and gutter on both sides. Requiring surfacing.	N/A	30

Table 7 only accounts for those incidental construction costs normally found on a typical project. The construction items found in Table 8 may or may not be on any particular project and the cost of these items is 25 percent. Add the percentage required (from 0 to 25 percent) based on the Regional recommendation with verification. If there are no additional items required, use the default of zero.

TABLE 8.—PERCENT OF ADDITIONAL INCIDENTAL CONSTRUCTION COST

Additional incidental construction item	Percent of total incidental construction cost
Fencing	1
Landscaping	9
Structural concrete	9
Traffic signals	3
Utilities	3

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

Transportation Planning

§ 170.400 What is the purpose of transportation planning?

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 is BIA's role in transportation planning?

Except as provided in § 170.402, the functions and activities that BIA must perform for the IRR Program are:

- (a) Preparing the regional IRR TIP;
- (b) Updating the IRR Inventory from data updates;
- (c) Preparing IRR Inventory data updates as needed;

(d) Coordinating with States and their political subdivisions, and appropriate planning authorities on regionally significant IRR projects;

(e) Providing technical assistance to tribal governments;

(f) Developing IRR Program budgets including transportation planning cost estimates;

(g) Facilitating public involvement;

(h) Participating in transportation planning and other transportation-related meetings;

(i) Performing traffic studies;

(j) Performing preliminary project planning;

(k) Conducting special transportation studies;

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

(m) Mapping;

(n) Developing and maintaining management systems;

(o) Performing transportation planning for operational and maintenance facilities; and

(p) Researching rights-of-way documents for project planning.

§ 170.402 What is the tribal role in transportation planning?

(a) All tribes must prepare a tribal TIP (TIP) or tribal priority list.

(b) Tribes with a self-determination contract or self-governance agreement may assume any of the following planning functions:

(1) Coordinating with States and their political subdivisions, and appropriate planning authorities on regionally significant IRR projects;

(2) Preparing IRR Inventory data updates;

(3) Facilitating public involvement;

(4) Performing traffic studies;

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

(6) Mapping;

(7) Developing and maintaining tribal management systems;

(8) Participating in transportation planning and other transportation related meetings;

(9) Performing transportation planning for operational and maintenance facilities;

(10) Developing IRR Program budgets including transportation planning cost estimates;

(11) Conducting special transportation studies, as appropriate;

(12) Researching rights-of-way documents for project planning; and

(13) Performing preliminary project planning.

§ 170.403 What IRR Program funds can be used for transportation planning?

Funds as defined in 23 U.S.C. 204(j) are specifically reserved for a tribal government's transportation planning. Tribes may also identify transportation planning as a priority in their tribal priority list or TTIP and request the use of up to 100 percent of their IRR Program construction funds for transportation planning.

§ 170.404 What happens when a tribe uses its IRR Program construction funds for transportation planning?

In order for IRR Program construction funds to be concentrated on the projects within the inventory, a tribe may use up to \$35,000 or 5 percent of its IRR Program construction funds, whichever is greater, for transportation planning. If a tribe exceeds this threshold, BIA will subtract the amount over the threshold from the tribe's CTC for the following year.

§ 170.405 Can tribal transportation planning funds be used for road construction and other projects?

Yes, any tribe can request to have its planning funds as defined in 23 U.S.C. 204(j) transferred into construction funds for use on any eligible and

approved IRR project. (Also see § 170.407.)

§ 170.406 How must tribes use planning funds?

(a) IRR Program funds as defined in 23 U.S.C. 204(j) are only available upon request of a tribal government and approved by the BIA Regional Office. These funds support development and implementation of tribal transportation planning and associated strategies for identifying transportation needs, including:

(1) Attending transportation planning meetings;

(2) Pursuing other sources of funds; and

(3) Developing the tribal priority list or any of the transportation functions/activities as defined in the FHWA IRR Program Transportation Planning Procedures and Guidelines (TPPG) or listed in § 170.402.

(b) A tribe may ask the BIA regional office to enter into a self-determination contract or self-governance agreement for transportation planning activities and functions under ISDEAA or it may request a travel authorization to attend transportation planning functions and related activities using these funds. (See appendix A of subpart B for use of IRR Program Funds.)

§ 170.407 What happens to unobligated planning funds?

Once all tribal governments' requests for tribal transportation planning funds have been satisfied for a given fiscal year or no later than August 15, the BIA regional office may use the remaining funds for construction after consultation with the affected tribal governments.

Long-Range Transportation Planning

§ 170.410 What is the purpose of tribal long-range transportation planning?

(a) The purpose of long-range transportation planning is to clearly demonstrate a tribe's transportation needs and to fulfill tribal goals by developing strategies to meet these needs. These strategies should address future land use, economic development, traffic demand, public safety, and health and social needs.

(b) The time horizon for long-range transportation planning should be 20 years to match state transportation planning horizons. A tribe may develop a long-range transportation plan under ISDEAA or may ask BIA to develop the plan on the tribe's behalf.

§ 170.411 What may a long-range transportation plan include?

A comprehensive long-range transportation plan may include:

(a) An evaluation of a full range of transportation modes and connections between modes such as highway, rail, air, and water, to meet 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 relating to transportation improvements;

(e) A review of the existing and proposed transportation system to identify the relationships between transportation and the environment;

(f) Cultural preservation planning to identify important issues and develop a transportation plan that is sensitive to tribal cultural preservation;

(g) Scenic byway and tourism plans;

(h) Measures that address energy conservation considerations;

(i) A prioritized list of short and long-term transportation needs; and

(j) An analysis of funding alternatives to implement plan recommendations.

§ 170.412 How is the tribal IRR long-range transportation plan developed and approved?

(a) The tribal IRR long-range transportation plan is developed by:

(1) A tribe working through a self-determination contract or self-governance agreement or other funding sources; or

(2) 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, the tribe and BIA should jointly conduct a midpoint review.

(c) The public reviews a draft IRR long-range transportation plan as required by § 170.413. The plan is further refined to address any issues identified during the public review process. The tribe then approves the IRR long-range transportation plan.

§ 170.413 What is the public role in developing the long-range transportation plan?

BIA or the tribe must solicit public involvement. If there are no tribal policies regarding public involvement, a tribe must use the procedures shown below. Public involvement begins at the same time long-range transportation

planning begins and covers the range of users, from stakeholders and private citizens to major public and private entities. Public involvement may be handled in either of the following two ways:

(a) *For public meetings*, BIA or a tribe must:

(1) Advertise each public meeting in local public newspapers at least 15 days before the meeting date. In the absence of local public newspapers, BIA or the tribe may post notices under local acceptable practices;

(2) Provide at the meeting copies of the draft long-range transportation plan;

(3) Provide information on funding and the planning process; and

(4) Provide the public the opportunity to comment, either orally or in writing.

(b) *For public notices*, BIA or a tribe must:

(1) Publish a notice in the local and tribal newspapers when the draft long-range transportation plan is complete. In the absence of local public newspapers, BIA or the tribe may post notices under local acceptable practices; and

(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).

§ 170.414 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 tribe or BIA (for direct service tribes) should:

(a) Review the IRR long-range transportation plan annually; and

(b) Update the plan every 5 years.

§ 170.415 What is pre-project planning?

(a) Pre-project planning is part of overall transportation planning and includes the activities conducted before final project approval on the IRR Transportation Improvement Program (IRRTIP). These activities include:

(1) Preliminary project cost estimates;

(2) Certification of public involvement;

(3) Consultation and coordination with States and/or MPO's for a regionally significant projects;

(4) Preliminary needs assessments; and

(5) Preliminary environmental and archeological reviews.

(b) The BIA regional office must work cooperatively with tribal, state, regional, and metropolitan transportation planning organizations concerning the

leveraging of funds from non-IRR Program sources and identification of other funding sources to expedite the planning, design, and construction of projects on the IRRTIP.

Transportation Improvement Program

§ 170.420 What is the tribal priority list?

The tribal priority list is a list of all transportation projects that the tribe wants funded. The list:

- (a) May or may not identify projects in order of priority;
- (b) Is not financially constrained; and
- (c) Is provided to BIA by official tribal action, unless the tribal government submits a Tribal Transportation Improvement Program (TTIP).

§ 170.421 What is the Tribal Transportation Improvement Program (TTIP)?

The TTIP:

- (a) Must be consistent with the tribal long-range transportation plan;
- (b) Must contain all IRR Program funded projects programmed for construction in the next 3 to 5 years;
- (c) Must identify the implementation year of each project scheduled to begin within the next 3 to 5 years;
- (d) May include other Federal, State, county, and municipal, transportation projects initiated by or developed in cooperation with the tribal government;
- (e) Will be reviewed and updated as necessary by the tribal government;
- (f) Can be changed only by the tribal government; and
- (g) Must be forwarded to BIA by resolution or by tribally authorized government action for inclusion into the IRRTIP.

§ 170.422 What is the IRR Transportation Improvement Program (IRRTIP)?

The IRRTIP:

- (a) Is financially constrained;
- (b) Must include eligible projects from tribal TTIPs;
- (c) Is selected by tribal governments from TTIPs or other tribal actions;
- (d) Is organized by year, State, and tribe; and
- (e) May include non-IRR projects for inclusion into the State Transportation Improvement Program (STIP).

§ 170.423 How are projects placed on the IRRTIP?

(a) BIA selects projects from the TTIP or tribal priority list for inclusion on the IRRTIP as follows:

- (1) The tribal government develops a list of detailed tasks and information for each project from the tribal priority list or TTIP;
- (2) BIA includes this project information in its region-wide control schedule without change, unless the

funding required exceeds the amount available to the tribe;

(3) BIA must include projects that are scheduled in the next 3 to 5 years; and

(4) BIA develops the IRRTIP after consulting with the tribes and taking their priorities into account.

(b) A tribe that does not generate enough annual funding under the IRR Program funding formula to complete a project may either:

(1) Submit its tribal priority list to the appropriate BIA Region, which will develop the region-wide control schedule after consulting with the tribe and taking its priorities into account; or

(2) Enter a consortium of tribes and delegate authority to the consortium to develop the TTIP and tribal control schedule;

(3) Enter into agreement with other tribes to permit completion of the project; or

(4) Apply for IRRHPP funding under subpart C.

(c) In order to get a project on the IRRTIP, tribes may seek flexible financing alternatives as described in subpart C.

§ 170.424 How does the public participate in developing the IRRTIP?

Public involvement is required in the development of the IRRTIP.

(a) BIA or the tribe must publish a notice in local and tribal newspapers when the draft tribal or IRRTIP is complete. In the absence of local public newspapers, the tribe or BIA may post notices under local acceptable practices. 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.

(b) BIA or the tribe may hold public meetings at which the public may comment orally or in writing.

(c) BIA, the tribe, the State transportation agency or MPO may conduct public involvement activities.

§ 170.425 How does BIA update the IRRTIP?

The IRRTIP annual update allows incorporation of transportation projects planned for the next 3 to 5 years. Each BIA regional office updates the IRRTIP for each State in its service area to reflect changes in the TTIPs or tribal project listings.

(a) During the first quarter of the fiscal year each BIA Regional Office notifies tribes of the update and provides projected IRR Program funding amounts and a copy of the previous year's regional IRRTIP.

(b) The tribe reviews any new transportation planning information,

priority lists, and TTIP and forwards an updated TTIP or project listing to BIA Regional Office on or before July 15.

(c) The BIA regional office reviews all submitted information with the tribes. BIA adds agreed-upon updates, including previously approved amendments (see § 170.427), to the IRRTIP so that the Secretaries can approve the new updated IRRTIP before the start of the next fiscal year.

§ 170.426 What is the approval process for the IRRTIP?

The approval process for the IRRTIP is:

(a) The BIA Regional Office forwards the IRRTIP to the Secretaries for review and approval;

(b) Federal Lands Highway Office will provide copies of the approved IRRTIP to the FHWA division office for transmittal to the State transportation agency for inclusion in the State Transportation Improvement Program (STIP). The approved IRRTIP will be returned to BIA;

(c) BIA sends copies of the approved IRRTIP to BIA Regional Offices and tribal governments; and

(d) Within 10 working days of receiving the approved IRRTIP and IRR Program funds, BIA enters the projects into the Federal finance system.

§ 170.427 How may an IRRTIP be amended?

(a) A tribe may amend the IRRTIP by changing its TTIP on or before July 15 and submitting the changed TTIP to BIA for inclusion in the IRRTIP. BIA's regional office will review all submitted information with the tribe and provide a written response (approving, denying, or requesting additional information) within 45 days. If the proposed IRRTIP amendment contains a project not listed on the current approved IRRTIP, BIA must submit the proposed amendment to FHWA for final approval.

(b) BIA may amend the IRRTIP:

(1) To add or delete projects or reflect significant changes in scope at any time if requested by the tribe; and

(2) To reduce funding or reschedule a project after consulting with the affected tribe and obtaining its consent, if practical.

(c) The Secretary may not reduce funding for or reschedule a project that is the subject of a negotiated agreement, except under the terms of the agreement.

(d) BIA amends the IRRTIP using the same public involvement process used to develop the original IRRTIP.

§ 170.428 How is the State Transportation Improvement Program related to the IRR TIP?

The annual update of the IRR TIP 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 and amendments are included with the STIP.

Public Hearings**§ 170.435 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. A public hearing must be held if a project:

- (a) Is a new route or facility;
- (b) Would significantly change the layout or function of connecting or related roads or streets;
- (c) Would cause a substantial adverse effect on adjacent property; or
- (d) Is controversial or expected to be controversial in nature.

§ 170.436 How are public hearings for IRR planning and projects funded?

(a) Public hearings for IRR planning are funded as follows:

- (1) Public hearings for TTIPS and long-range transportation plans conducted by tribes are funded using the funds defined in title 23 U.S.C. 204(j) or IRR Program construction funds; and
- (2) Public hearings for a tribe's long-range transportation plan conducted by BIA at the tribe's request are funded using the tribes' funds as defined in title 23 U.S.C. 204(j) or IRR Program construction funds.

(b) Public hearings for IRR projects conducted by either tribes or BIA are funded using IRR Program construction funds.

§ 170.437 How must BIA or a tribe inform the public when no hearing is held?

(a) When no public hearing for an IRR project is scheduled, either the tribe or BIA must give adequate notice to the public before project activities are scheduled to begin. The notice should include:

- (1) Project location;
- (2) Type of improvement planned;
- (3) Dates and schedule for work;
- (4) Name and address where more information is available; and
- (5) Provisions for requesting a hearing.

(b) If the work is not to be performed by the tribe, BIA must send a copy of the notice to the affected tribe.

§ 170.438 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 a courtesy copy of the notice to the affected tribe(s) and BIA Regional Office.

§ 170.439 How is a public hearing conducted?

(a) *Who conducts the hearing.* A tribal or Federal official is appointed to preside over 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 explains the purpose of the hearing and provides an agenda;

(2) The presiding official solicits public comments from the audience on the merits of IRR projects and activities; and

(3) The presiding official informs the hearing audience of the appropriate procedures for a proposed IRR project or activity, that may include, but are not limited to:

- (i) Project development activities;
- (ii) Rights-of-way acquisition;
- (iii) Environmental and archeological clearance;
- (iv) Relocation of utilities and relocation services;

(v) Authorized payments allowed by the Uniform Relocation and Real Property Acquisition Policies Act, 42 U.S.C. 4601 *et seq.*, as amended;

(vi) Draft transportation plan; and

(vii) The scope of the project and its effect on traffic during and after construction.

(d) *Availability of information.*

Appropriate maps, plats, project plans and 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.

§ 170.440 How can the public learn the results of a public hearing?

Results of a public hearing are available as follows:

(a) Within 20 working days of the completion of the public hearing, the presiding official issues a hearing statement summarizing the results of the public hearing and the determination of needed further action.

(b) The presiding official posts the hearing statement at the hearing site. The public may request a copy. The hearing statement outlines appeal procedures.

§ 170.441 Can a decision resulting from a hearing be appealed?

Yes. A decision resulting from the public hearing may be appealed pursuant to 25 CFR part 2.

IRR Inventory**§ 170.442 What is the IRR Inventory?**

(a) The IRR Inventory is a comprehensive database of all transportation facilities eligible for IRR Program funding by tribe, reservation, 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, and ownership.

(b) Elements of the inventory are used in the Relative Need Distribution Factor. BIA or tribes can also use the inventory to assist in transportation and project planning, justify expenditures, identify transportation needs, maintain existing IRR transportation facilities, and develop management systems.

§ 170.443 How can a tribe list a proposed transportation facility in the IRR Inventory?

A proposed IRR transportation facility is any transportation facility, including a highway bridge, that will serve public

transportation needs, is eligible for construction under the IRR Program and does not currently exist. To be included in the IRR inventory, a proposed transportation facility must:

- (a) Be supported by a tribal resolution or other official tribal authorization;
- (b) Address documented transportation needs as developed by and identified in tribal transportation planning efforts, such as the long-range transportation plan;
- (c) Be eligible for IRR Program funding; and
- (d) Be open to the public when built.

§ 170.444 How is the IRR Inventory updated?

The IRR Inventory data for a tribe is updated on an annual basis as follows:

- (a) Each BIA Regional Office provides the tribes in its region copies of the IRR Inventory by November 1st of each year;
- (b) The tribe reviews the data and submits changes (together with a strip map of each change) to the BIA Regional Office along with authorizing resolutions or similar official authorization by March 15;
- (c) The BIA Regional Office reviews each tribe's submission for errors or omissions and provides the tribe with its revised inventory by May 15;
- (d) The tribe must correct any errors or omissions by June 15;
- (e) Each BIA Regional Office certifies its data and enters the data into the IRR Inventory by July 15;
- (f) BIA provides each tribe with copies of the Relative Need Distribution Factor distribution percentages by August 15; and
- (g) BIADOT approves submissions from BIA Regional Offices before they are included in the National IRR Inventory.

§ 170.445 What is a strip map?

A strip map is a graphic representation of a section of road or other transportation facility being added to or modified in the IRR Inventory. Each strip map submitted with an IRR Inventory change must:

- (a) Define the facility's location with respect to State, county, tribal, and congressional boundaries;
- (b) Define the overall dimensions of the facility and the accompanying inventory data;
- (c) Include a table that provides the IRR Inventory information about the transportation facility.

Environmental and Archeological Requirements

§ 170.450 What archeological and environmental requirements must the IRR Program meet?

- (a) The archeological and environmental requirements with which BIA must comply on the IRR Program are contained in Appendix A to this subpart.
- (b) 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.

§ 170.451 Can IRR Program funds be used for archeological and environmental compliance?

Yes. For approved IRR projects, IRR Program 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 bridge rights-of-way;
- (b) Borrow pits and 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

§ 170.454 What design standards are used in the IRR Program?

- (a) Appendix B to this subpart lists design standards that BIA may use for the IRR program.
- (b) BIA may also use FHWA-approved State or tribal design standards.
- (c) Tribes may propose road and bridge design standards to be used in the IRR Program that 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.

§ 170.455 How are design standards used in IRR projects?

The standards in this section must be applied to each construction project consistent with a minimum 20-year design life for highway projects and 75-year design life for highway bridges. The design of IRR projects must take into consideration:

- (a) The existing and planned future use of the IRR transportation 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.

§ 170.456 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. The tribe must submit its request for a design exception to the BIA Regional Office for approval. If the BIA Regional Office has design exception approval authority within their IRR Stewardship Plan with FHWA, they may approve or decline the request; otherwise BIA forwards the request to FHWA. The engineer of record must submit written documentation with appropriate supporting data, sketches, details, and justification based on engineering analysis.

- (a) FHWA or BIA may grant exceptions for:

- (1) Experimental features on projects; and

- (2) Projects where conditions warrant that exceptions be made.

- (b) FHWA or BIA can approve a project design that does not conform to the minimum criteria only after giving due consideration to all project conditions, such as:

- (1) Maximum service and safety benefits for the dollar invested;

- (2) Compatibility with adjacent features; and

- (3) Probable time before reconstruction of the project due to changed conditions or transportation demands.

- (c) FHWA or BIA have 30 days from receiving the request to approve or decline the exception.

§ 170.457 Can a tribe appeal a denial?

Yes. If BIA denies a design exception request made by a tribe, the decision may be appealed to FHWA. Tribes may appeal the denial of a design exception to: FHWA, 400 7th St., SW., HFL-1, Washington, DC 20590. If FHWA denies a design exception, the tribe may appeal the decision to the next higher level of review within the Department of Transportation at the Office of the FHWA Administrator, 400 7th Street, SW., HOA-1, Washington, DC 20590.

Review and Approval of Plans, Specifications, and Estimates

§ 170.460 What must a project package include?

(a) The minimum requirements for a project package are:

- (1) Plans;
- (2) Specifications; and
- (3) Estimates.

(b) In order to receive project approval the following additional items are required:

- (1) A tribal resolution or other authorized document supporting the project;
 - (2) Right-of-way clearances;
 - (3) Required environmental, archeological, and cultural clearances; and
 - (4) Identification of design exceptions if used in the plans.
- (c) A tribe may include additional items at its option.

§ 170.461 May a tribe approve plans, specifications, and estimates?

A tribe may review and approve plan, specification, and estimate (PS&E) project packages for IRR Program funded projects when:

(a) This function is included in the tribe's self-determination contract or self-governance agreement; or

(b) The tribe is the owner of the IRR transportation facility or is responsible for maintaining the facility. In this case, the tribe must have at least 30 days to review and approve the proposed PS&E package.

§ 170.462 When may a self-determination contract or self-governance agreement include PS&E review and approval?

(a) For a BIA or tribally-owned facility, the tribe may assume responsibility to review and approve PS&E packages under a self-determination contract or self-governance agreement if the tribe specifies in the contract or agreement that:

(1) A licensed professional engineer will supervise design and approval of the PS&E package;

(2) A licensed professional engineer will certify that the PS&E meets or exceeds the design, health, and safety standards in appendix B to subpart D for an IRR transportation facility;

(3) An additional licensed professional engineer (either a BIA engineer or, if the tribe chooses, a non-BIA engineer) will review the PS&E

package when it is at least 95 percent complete; and

(4) If the project is to be performed by the tribe, the tribe will provide a copy of the certification and approved PS&E package to BIA before the solicitation of the project or notice to proceed.

(b) For a facility maintained by a public authority other than BIA or a tribe, in addition to satisfying the requirements of paragraph (a) of this section:

(1) The public authority must have a chance to review and approve the PS&E when it is between 75 percent and 95 percent complete, unless an agreement between the tribe and the public authority states otherwise;

(2) If a licensed professional engineer performs the review and approval when the PS&E provided is at least 95 percent complete, the second level review requirement in paragraph (a)(2) of this section is satisfied; and

(3) The tribe must allow the public authority at least 30 days for review and approval. If the public authority does not meet this deadline or an extension granted by the tribe, the tribe may proceed with the review in accordance with paragraph (a)(2) of this section.

(c) If a BIA engineer does not complete a review within 30 days under paragraph (a)(2) of this section, the tribe may contract its own engineer to perform the review.

§ 170.463 What should the Secretary do if a design deficiency is identified?

If a review under § 170.462 identifies a design deficiency that may jeopardize public health and safety if the facility is completed, the Secretary must:

(a) For a tribally-approved PS&E package, immediately notify the tribe of the design deficiency and request that the tribe promptly resolve the deficiency in accordance with the standards in appendix B to subpart D; and

(b) For a BIA-approved PS&E package, promptly resolve the deficiency in accordance with the standards in appendix B to subpart D and notify the tribe of the required design changes.

Construction and Construction Monitoring

§ 170.470 What are the IRR construction standards?

(a) Appendix B to this subpart lists design standards that may be used for roads and bridges.

(1) Tribes may propose road and highway bridge construction standards that are consistent with or exceed these standards.

(2) BIA may also use FHWA-approved, State or tribal road and highway bridge construction standards.

(b) For designing and building eligible intermodal projects funded by the IRR Program, tribes must use either:

(1) Nationally recognized standards for comparable projects; or

(2) Tribally adopted standards that meet or exceed nationally recognized standards for comparable projects.

§ 170.471 How are projects administered?

(a) When a tribe carries out an IRR project under ISDEAA, 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 BIA discovers a problem during an on-site monitoring visit, BIA must promptly notify the tribe and, if asked, provide technical assistance.

(b) BIA or the tribal government, as provided for under the contract or agreement, is responsible for day-to-day project inspections except for BIA monitoring under paragraph (a) of this section.

(c) BIA must process substantial changes in the scope of a construction project in coordination with the affected tribe.

(d) The tribe, other contractors, and BIA may perform quality control.

(e) Only the licensed professional engineer may change an IRR project's plans, specifications, and estimates (PS&E) during construction.

(1) 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.

(2) In making any substantial change, the approving agency must consult with the affected tribe and the entity having maintenance responsibility.

(3) A change that exceeds the limits of available funding may be made only with the approving agency's consent.

§ 170.472 What 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	All records required by ISDEAA and 25 CFR 900.130–131 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.

§ 170.473 What happens when a construction project ends?

(a) At the end of a construction project, the agency or organization responsible for the project must make a final inspection. The inspection determines whether the project has been completed in reasonable conformity with the PS&E.

(1) Appropriate officials from the tribe, BIA, and FHWA should participate in the inspection, as well as contractors and maintenance personnel.

(2) All project information must be made available during final inspection and used to develop the IRR construction project closeout report. Some examples of project information are: Daily diaries, weekly progress reports, subcontracts, subcontract expenditures, salaries, equipment expenditures, as-built drawings, *etc.*

(b) 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. Closeout occurs after:

(1) The final project inspection concludes; and

(2) The facility owner makes final acceptance of the project.

§ 170.474 Who conducts the project closeout?

The following table shows who must conduct the IRR construction project closeout and develop 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; (2) Review the bid item quantities and expenditures to ensure reasonable conformance with the PS&E and modifications; (3) Be completed within 120 calendar days of the date of acceptance of the IRR construction project; and (4) Be provided to the affected tribes and the Secretaries.
(b) A tribe	Agreements negotiated under ISDEAA specify who is responsible for closeout and preparing the report.	(1) Meet the requirements of ISDEAA; (2) Comply with 25 CFR 900.130(d) and 131(b) (10) and 25 CFR 1000.249, as applicable; (3) Be completed within 120 calendar days of the date of acceptance of the project; and (4) Be provided to all parties specified in the agreements negotiated under ISDEAA.

Program Reviews and Management Systems

§ 170.500 What program reviews do the Secretaries conduct?

(a) BIADOT and FHWA annually conduct informal program reviews to examine program procedures and identify improvements. BIA must notify tribes of these informal program reviews. Tribes may send representatives to these meetings at their own expense. These reviews may be held in conjunction with either a national BIA transportation meeting or an IRR Program Coordinating Committee meeting.

(b) FHWA, BIA, and affected tribes periodically conduct an IRR Program process review of each BIA regional office's processes, controls, and stewardship. The review provides recommendations to improve the processes and controls of the following activities that a BIA Regional Office performs:

- (1) Program Management and Oversight;
- (2) Transportation planning;
- (3) Design;
- (4) Contract administration;
- (5) Construction;
- (6) Financial management; and
- (7) Systems management and existing stewardship agreements.

(c) After the IRR process review, the review team must:

- (1) Conduct an exit interview during which it makes a brief oral report of findings and recommendations to the BIA Regional Director and staff; and
- (2) Provide a written report of its findings and recommendations to the reviewed office, BIA, all participants, and affected tribal governments and organizations.

§ 170.501 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 implements the plan and reports either annually or biennially to BIADOT and FHWA on implementation accomplishments.

§ 170.502 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 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
- (3) Intermodal transportation facilities and systems.

(c) All management systems for the IRR Program must meet the requirements of 23 CFR part 973.

(d) A tribe may enter into an ISDEAA contract or agreement to develop, implement, and maintain an alternative tribal management system for that tribe, provided that such systems are consistent with Federal management systems.

§ 170.503 How are IRR Program management systems funded?

BIA uses IRR Program management funds to develop the nationwide IRR Program management systems. If a tribe elects to develop its own tribal management system based on the nationwide management system requirements in 23 CFR part 973, it may use for this purpose either:

(a) The funds defined in 23 U.S.C. 204(j) for IRR Program tribal transportation planning; or

(b) IRR Program construction funds.

Bridge Inspection

§ 170.504 When and how are bridge inspections performed?

IRR bridge inspections must be performed at least every 2 years to update the NBI using criteria that meets or exceeds applicable Federal standards (23 CFR 650.305).

(a) Federal standards for bridge inspections are found in 23 CFR part 650, subpart C.

(b) Tribes may develop alternative bridge inspection standards, provided that these standards meet or exceed applicable Federal standards.

§ 170.505 How must bridge inspections be coordinated?

This section applies to bridge inspectors working for BIA; for tribes under an ISDEAA contract or self-governance agreement; or for State, county, or local governments. Before performing an inspection, inspectors must:

(a) Notify affected tribes and State and local governments that an inspection will occur;

(b) Offer tribal and State and local governments the opportunity to accompany the inspectors; and

(c) Otherwise coordinate with tribal and State and local governments.

§ 170.506 What are the minimum qualifications for certified bridge inspectors?

The person responsible for the bridge inspection team must meet the qualifications for bridge inspectors as defined in 23 CFR part 650, subpart C.

§ 170.507 Who reviews bridge inspection reports?

The person responsible for the bridge inspection team must send a copy of the inspection report to the BIA regional office. The regional office:

(a) Reviews the report and furnishes a copy to the affected tribe for review, comment, and use in programming transportation projects; and

(b) Sends the report to BIADOT for quality assurance and inclusion in the National Bridge Inventory (NBI).

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

All BIA work for the IRR Program must comply with cultural resource and environmental requirements under applicable Federal laws and regulations, including, but not limited to:

1. 16 U.S.C. 1531, Endangered Species Act.
2. 16 U.S.C. 4601, 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. 50 CFR part 402, Endangered Species Act regulations.
12. 7 CFR part 658, Farmland Protection Policy Act regulations.
13. 40 CFR part 93, Air Quality Conformity and Priority Procedures for use in Federal-aid Highway and Federally-Funded Transit Programs.
14. 23 CFR part 771, Environmental Impact and Related Procedures.
15. 23 CFR part 772, Procedures for Abatement of Highway Traffic Noises and Construction Noises.
16. 23 CFR part 777, Mitigation of Impacts To Wetlands and Natural Habitat.
17. 36 CFR part 800, Protection of Historic Properties.
18. 40 CFR parts 260–271, Resource Conservation and Recovery Act.
19. Applicable tribal/State laws.
20. Other applicable Federal laws and regulations.

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 ISDEAA, these provisions do not apply.

1. AASHTO Policy on Geometric Design of Highways and Streets.
2. AASHTO A Guide for Transportation Landscape and Environmental Design.

3. AASHTO Roadside Design Guide, latest edition.

4. AASHTO Guide for Selecting, Locating and Designing Traffic Barriers, latest edition.

5. AASHTO Standard Specifications for Highway Bridges, latest edition.

6. AASHTO Guidelines of Geometric Design of Very Low-Volume Local Roads (ADT less than or equal to 400).

7. FHWA Federal Lands Highway, Project Development and Design Manual.

8. FHWA Flexibility in Highway Design.

9. FHWA Roadside Improvements for Local Road and Streets.

10. FHWA Improving Guardrail Installations and Local Roads and Streets.

11. 23 CFR part 625, Design Standards for Highways.

12. 23 CFR part 630, Preconstruction Procedures.

13. 23 CFR part 633, Required Contract Provisions.

14. 23 CFR part 635, Construction and Maintenance.

15. 23 CFR part 645, Utilities.

16. 23 CFR part 646, Railroads.

17. 23 U.S.C. 106, PS&E.

18. 23 U.S.C. 109, Standards.

19. DOT Metric Conversion Plan, October 31, 1991.

20. MUTCD Manual of Uniform Traffic Safety Devices, latest edition.

21. Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, latest edition.

Subpart E—Service Delivery for Indian Reservation Roads

Funding Process

§ 170.600 What must BIA include in the notice of availability of funds?

(a) Upon receiving the total fiscal year of IRR Program funding from FHWA, BIA will publish a notice of availability of funds in the **Federal Register** that includes the following:

(1) The total funding available to each region for IRR transportation planning, design, and construction projects based on each region's Relative Need Distribution Factor (RNDF) defined in subpart C;

(2) The total funding available to each tribe based on its RNDF, along with prior year information on IRR Program funding by tribe that identifies over-funded or advance-funded tribes; and

(3) A listing of FHWA-approved IRR TIP projects for each State within each BIA region.

(b) Upon publication of the notice under this section, each BIA Regional Office must provide to each tribe within its region:

(1) A proposed project listing used to develop the region's control schedule;

(2) An offer to provide the tribe with technical assistance in preparing contract proposals;

(3) The various options available to the tribe for IRR construction projects

(force account methods, direct service, self-determination contract, and self-governance agreement); and

(4) A request for a response from the tribe within 30 days.

§ 170.601 What happens to the unused portion of IRR Program management and oversight funds reserved by the Secretary?

BIA distributes any unused IRR Program management and oversight funds to its Regional Offices using the RNDF (see subpart C). The Regional Offices use the funds for additional construction activities.

§ 170.602 If a tribe incurs unforeseen construction costs, can it get additional funds?

Yes. To the extent feasible, the Secretary must pay for all costs incurred resulting from unforeseen circumstances of the construction process (*i.e.*, cost overruns). If the Secretary is unable to fund the unforeseen costs in a cost reimbursable contract, the tribe may suspend performance of the contract until sufficient additional funds are awarded. (See 25 CFR 900.130(e).)

Miscellaneous Provisions

§ 170.605 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 the IRR Program. However, BIA must continue to consult with the tribe before using a force account under this situation. The applicable FAR and Federal law apply to BIA force account project activities.

§ 170.606 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
Buy Indian Act	No	No	Yes.
Buy American Act	No	No	Yes.
Federal Acquisition Regulation (FAR)	No ¹	No	Yes.
Federal Tort Claims Act	Yes	Yes	Yes.
Davis-Bacon Act	Yes ²	Yes ²	Yes.

¹ Unless agreed to by the tribe or tribal organization under ISDEAA, 25 U.S.C. 450j(a), and 25 CFR part 900.115.

² Does not apply when tribe performs work with its own employees.

§ 170.607 Can a tribe use its allocation of IRR Program funds for contract support costs?

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

§ 170.608 Can a tribe pay contract support costs from Department of the Interior or BIA appropriations?

No. Contract support costs for IRR construction projects cannot be paid out of Department of the Interior or BIA appropriations.

Contracts and Agreements Under ISDEAA

§ 170.610 What IRR Program functions may a tribe assume under ISDEAA?

A tribe may assume all IRR Program functions and activities that are otherwise contractible under a self-determination contract or self-governance agreement following the requirements in 25 CFR parts 900 or 1000.

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

(b) Appendix A to this subpart contains a list of non-contractible functions and activities that cannot be included in contracts or agreements.

§ 170.611 What special provisions apply to ISDEAA contracts and agreements?

(a) *Multi-year contracts and agreements.* The Secretary can enter into a multi-year IRR Program self-determination contract and self-governance agreement with a tribe under sections 105(c)(1)(A) and (2) of ISDEAA. The amount of such contracts or agreements is subject to the availability of appropriations.

(b) *Consortia.* Under Title I and Title IV of ISDEAA, tribes and 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, see Title IV, 25 U.S.C. 450b(1) and 458b(b)(2).

(c) *Advance payments.* The Secretary and the tribe must negotiate a schedule of advance payments as part of the terms of a self-determination contract in accordance with 25 CFR 900.132.

(d) *Design and construction contracts.* The Secretary can enter into a design/construct IRR Program self-determination contract that includes both the design and construction of one or more IRR projects. The Secretary may make advance payments to a tribe:

(1) Under a self-determination design/construct contract for construction activities based on progress, need, and the payment schedule negotiated under 25 CFR 900.132; and

(2) Under a self-governance agreement in the form of annual or semiannual installments as indicated in the agreement.

§ 170.612 How are non-contractible functions funded?

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

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

§ 170.613 When does BIA determine the amount of funds needed for non-contractible non-project related functions?

Each fiscal year the Secretary will develop national and regional BIA IRR Program budgets. Within the first quarter of each fiscal year BIA will publish a copy of the national and regional IRR budgets.

§ 170.614 Can a tribe receive funds before BIA publishes the notice of funding availability?

A tribe can receive funds before BIA publishes the notice of funding availability required by § 170.600(a)(1) only if the tribe has a negotiated self-determination contract or self-governance agreement.

§ 170.615 Can a tribe receive advance payments for non-construction activities?

Yes. BIA must make advance payments to a tribe for non-construction

activities under 25 U.S.C. 450/ for self-determination contracts on a quarterly, semiannual, lump-sum, or other basis proposed by a tribe and authorized by law.

§ 170.616 How are advance payments made when additional IRR Program funds are made available after execution of the self-governance agreement?

When additional IRR Program funds are available, following the procedures in 25 CFR 1000.104, tribes can request to use the additional funds for IRR Program activities or projects and have an addendum to the agreement executed.

§ 170.617 May a tribe include a contingency in its proposal budget?

(a) A tribe with a self-determination contract may include a contingency amount in its proposed budget in accordance with 25 CFR 900.127(e)(8).

(b) 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 Program funding allocation in the agreement.

(c) The amounts in both paragraphs (a) and (b) of this section must be within the RNDF allocation or within the negotiated ISDEAA contract or agreement.

§ 170.618 Can a tribe keep savings resulting from project administration?

When actual costs of the projects under contracts or agreements for construction projects are less than the estimated costs, the Secretary will determine the use of the excess funds after consultation with the tribe. (See 25 U.S.C. 450e-2.)

§ 170.619 Do tribal preference and Indian preference apply to IRR Program funding?

Tribal preference and Indian preference apply to IRR Program funding as shown in the following table:

If . . .	Then . . .
(a) A contract serves a single tribe.	Section 7(c) under Title I of ISDEAA allows tribal employment or contract preference laws, including tribe local preference laws, to govern.
(b) A contract serves more than one tribe.	Section 7(b) under Title I of ISDEAA applies.
(c) A self-governance agreement exists under Title IV of ISDEAA.	25 CFR 1000.406 applies.

§ 170.620 How do 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) of ISDEAA in a cooperative agreement.

§ 170.621 What if a tribe fails to substantially perform work under a contract or agreement?

If a tribe fails to substantially perform work under 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 ISDEAA, part 900 subpart L (appeals); and

(b) For self-governance agreements, the Secretary must use the monitoring and enforcement procedures in 25 CFR part 1000 subpart K.

§ 170.622 What IRR programs, functions, services, and activities are subject to the self-governance construction regulations?

All IRR Program design and construction projects and activities, whether included separately or under a program in the agreement, are subject to the regulations in 25 CFR 1000 subpart K, including applicable exceptions.

§ 170.623 How are IRR Program projects and activities included in a self-governance agreement?

To include an IRR Program project or activity in a self-governance agreement, the following information is required:

(a) A line item for each project or activity;

(b) Sufficient detail to describe the work as included in the FHWA-approved IRR TIP and Control Schedule; and

(c) All other information required under 25 CFR 1000 subpart K.

§ 170.624 Is technical assistance available?

Yes. Technical assistance is available from BIA for tribes with questions about contracting the IRR Program or IRR projects. For tribes 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.

§ 170.625 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.

§ 170.626 How does a tribe request a waiver of a Department of Transportation regulation?

A tribe must follow the procedures in ISDEAA, Title I, and 25 CFR 900.140-148 for self-determination contracts and Title IV, 25 CFR 1000.220-232 for tribal self-governance agreements. A courtesy copy of the request should be sent to the Secretary of Transportation at: 400 7th St., SW., HFL-1, Washington, DC 20590. When a waiver request is outside the Secretary's authority, the Secretary should forward the request to the Secretary of Transportation.

Appendix A to Subpart E—IRR Program Functions That Are Not Otherwise Contractible

The program functions listed in this appendix cannot be included in a self-determination contract or self-governance agreement. (23 U.S.C. 202(d)(3)(B))

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 under 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 rights-of-way documents.

F. Conducting project development and design under 25 CFR 900.131:

1. Participating in the plan-in-hand reviews on behalf of BIA as facility owner;

2. Reviewing and/or approving plans, specifications, and cost estimates (PS&E's) for health and safety assurance on behalf of BIA as facility owner;

3. Reviewing PS&E's to assure compliance with NEPA as well as all other applicable 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 on behalf of BIA 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, ISDEAA and part 1000; and

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

I. BIADOT 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 Program stewardship agreements in conjunction with FHWA;

8. Developing annual IRR Program obligation and IRR Program accomplishments reports;

9. Developing reports on IRR Program 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, Indian Local 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;

16. Coordinating with and monitoring Indian Local 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, regional, and local transportation organizations;

21. Participating in and supporting FHWA Coordinated Technology Implementation 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 approving 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;

31. Performing any other non-contractible IRR Program activity included in this part; and

32. Determining eligibility of new uses of IRR Program funds.

J. BIADOT 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 funds to BIA regions;

11. Reprogramming unused IRR transportation planning funds at the end of the fiscal year;

12. Monitoring the nationwide obligation of IRR transportation planning 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. BIADOT 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 technical criteria for management systems.

L. BIADOT 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's; and

5. Developing criteria for bridge management systems.

M. BIADOT 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 Program 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 Program stewardship agreements;

12. Developing quarterly/annual IRR Program 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;

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 and BIA region/agency personnel;

19. Participating in national, regional, or local transportation organizations meetings and workshops;

20. Reviewing Coordinated Technology Implementation 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 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 to the application for ERFO funds, administration, and oversight of such funds; and

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

O. BIA 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 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 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 regional offices' other responsibilities for performing other non-contractible required IRR Program activities contained in this part.

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 May a direct service tribe and BIA Region sign a Memorandum of Understanding?

Yes. An IRR Program 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.

§ 170.702 What activities may the Secretary review and monitor?

The Secretary reviews and monitors the performance of construction activities under 25 CFR 900 subpart J and 25 CFR 1000 subpart K.

Subpart G—BIA Road Maintenance

§ 170.800 Who owns IRR transportation facilities?

Public authorities such as tribes, States, counties, local governments, and the Federal Government own IRR transportation facilities.

§ 170.801 What is the BIA Road Maintenance Program?

The BIA Road Maintenance Program covers the distribution and use of the funds provided by Congress in the annual Department of the Interior appropriations acts for maintaining transportation facilities. Appendix A to this subpart contains a list of activities that are eligible for funding under the BIA road maintenance program.

§ 170.802 How is road maintenance funded?

(a) 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.

(b) The States, counties, and local governments fund the maintenance of IRR transportation facilities that they own or have agreed to maintain.

(c) Tribal governments, at their discretion, may also provide for the

maintenance of IRR transportation facilities.

§ 170.803 What facilities are eligible under the BIA Road Maintenance Program?

(a) The following public transportation facilities are eligible for maintenance under the BIA Road Maintenance Program:

(1) BIA transportation facilities listed in paragraph (b) of this section;

(2) Non-BIA transportation 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, highway bridges, trails, and bus stations; and

(4) Other transportation facilities as approved by the Secretary.

(b) The following BIA transportation facilities are eligible for maintenance under paragraph (a)(1) of this section:

(1) BIA road systems and related road appurtenances such as signs, traffic signals, pavement striping, trail markers, guardrails, etc.;

(2) Highway bridges and drainage structures;

(3) Airport runways and heliport pads, including runway lighting;

(4) Boardwalks;

(5) Adjacent parking areas;

(6) Maintenance yards;

(7) Bus stations;

(8) System public pedestrian walkways, paths, bike and other trails;

(9) Motorized vehicle trails;

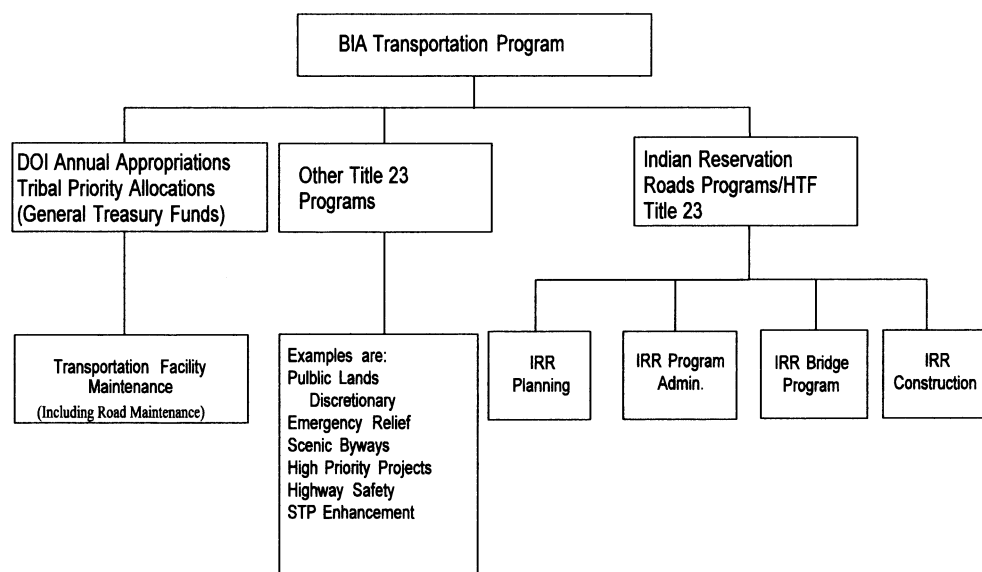
(10) Public access roads to heliports and airports;

(11) BIA and tribal post-secondary school roads and parking lots built with IRR Program funds; and

(12) Public ferry boats and boat ramps.

§ 170.804 How is BIA's Road Maintenance Program related to the IRR Program?

The following chart illustrates how BIA's Road Maintenance Program is related to other Title 23 U.S.C. programs:



§ 170.805 What are the local, tribal, and BIA roles in transportation 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 BIA Region in appropriations of BIA Road Maintenance dollars.

§ 170.806 What is an IRR Transportation Facilities Maintenance Management System?

An IRR Transportation Facilities Maintenance Management System (TFMMS) is a tool BIA and tribes will use to budget, prioritize, and schedule transportation facility maintenance activities. It will be used to extend the service life of an IRR transportation facility, ensure safety, and report future funding needs to the Secretary. BIA will develop the IRR TFMMS.

§ 170.807 What must BIA include when it develops an IRR Transportation Facilities Maintenance Management System?

(a) At a minimum, an 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 Program management systems;
- (5) Future needs; and
- (6) Basic facility data including but not limited to route, bridge number, maintenance activity code, facility inspection dates.

§ 170.808 Can BIA Road Maintenance Program funds be used to improve IRR transportation facilities?

No. BIA Road Maintenance Program funds cannot be used to improve roads or other IRR transportation facilities to a higher road classification, standard, or capacity.

§ 170.809 Can a tribe perform road maintenance under a self-determination contract or self-governance agreement?

Yes. Any tribe may enter into a self-determination contract or self-governance agreement to conduct BIA or tribal transportation facility maintenance under ISDEAA and 25 CFR part 900 or 1000. The self-determination contract or self-governance agreement

does not relieve BIA of its responsibility for maintenance.

§ 170.810 To what standards must an IRR transportation facility be maintained?

IRR transportation facilities must be maintained, subject to availability of funding, in accordance with the IRR TFMMS. The Secretary will develop these standards with the input 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 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 self-determination contract or self-governance agreement.

§ 170.811 What happens if lack of funds results in inadequate maintenance?

If BIA determines that an IRR transportation facility is not being maintained under IRR TFMMS standards due to insufficient funding, the Secretary will notify the facility owner, and if tribal or BIA owned, continue to request annual maintenance funding for that facility. In addition, the Secretary will report these findings to Secretary of Transportation under 23 U.S.C. 204. The Secretary will provide a draft copy of the report to the affected tribe for comment before forwarding it to Secretary of Transportation.

§ 170.812 What is emergency maintenance?

Emergency maintenance is work that must be accomplished immediately because of life threatening circumstances due to a catastrophic failure or natural disaster. 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 disasters.

§ 170.813 When can access to IRR transportation facilities be restricted?

IRR transportation facilities must be open and available for public use, as are IRRs (§ 170.120).

(a) The Secretary may, in consultation with a tribe and applicable private landowners, restrict or temporarily close an IRR transportation facility to public use for the following reasons:

- (1) Because of unsafe conditions;
- (2) Because of 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) Consultation is not required whenever the above conditions involve immediate safety or life-threatening situations.

(c) Certain IRR transportation facilities owned by the tribes or BIA may be permanently closed when the tribal government and the Secretary agree. Once this agreement is reached, BIA must remove the facility from the IRR System.

Appendix A to Subpart G—List of Activities Eligible for Funding Under 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. Administering 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 ferry boats.
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 Provisions**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, they 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, the International Atomic Energy Agency, the 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, 171–180; 10 CFR part 71.

§ 170.902 What is the role of State, tribal, and local governments?

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 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 Who notifies tribes of the transport of radioactive waste?

The Department of Energy (DOE) has elected, by policy, to notify tribes 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, DOE typically:

- (a) Ensures that appropriate State and tribal agencies are contacted and coordinate any necessary Radiological Assistance Program team activities; and
- (b) Dispatches a Radiological Assistance Program team that may include nuclear engineers, health physicists, industrial hygienists, public affairs specialists, and other personnel who provide related services.

§ 170.905 How can tribes obtain training in handling hazardous material?

- (a) Tribes cannot use IRR Program funds to train personnel to handle radioactive and hazardous material.
- (b) Tribes can seek training from DOE, EPA, NRC, OSHA, States, and other sources. Funding is available from DOT under the Hazardous Materials Uniform Safety Act, EPA for monitoring and FEMA for general preparedness.

§ 170.906 Who cleans up radioactive and hazardous material spills?

The carrier is typically responsible for cleanup of a radioactive or hazardous material spill with assistance from the shipper using established standards and guidelines. The carrier 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 or projects to a tribe within a reasonable time.

§ 170.911 Are Indians entitled to employment and training preferences?

(a) Federal law gives hiring and training preferences, to the greatest extent feasible, to Indians for all work performed under the IRR Program.

(b) 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.

§ 170.912 Does Indian employment preference apply to Federal-aid Highway Projects?

(a) Tribal, State, and local governments may provide an Indian employment preference for Indians living on or near a reservation on projects and contracts that meet the definition of an Indian Reservation Road. (See 23 U.S.C. 101(a)(12) and 140(d), and 23 CFR 635.117(d).)

(b) Tribes may target recruiting efforts toward Indians living on or near Indian reservations, Indian lands, Alaska Native villages, pueblos, and Indian communities.

(c) Tribes and tribal employment rights offices should 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.

§ 170.913 Do tribal-specific employment rights and contract preference laws apply?

Yes. When a tribe or consortium administers an IRR Program or project intended to benefit that tribe or a tribe within the consortium, the benefitting tribe's employment rights and contracting preference laws apply. (See § 170.619 and 25 U.S.C. 450e(c).)

§ 170.914 What is the difference between tribal preference and Indian preference?

Indian preference is a hiring 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.

§ 170.915 May tribal employment taxes or fees be included in an IRR project budget?

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.

§ 170.916 May tribes impose taxes or fees on those performing IRR Program services?

Yes. Tribes, as sovereign nations, may impose taxes and fees for IRR Program activities. When a tribe administers IRR programs or projects under ISDEAA, its tribal employment and contracting preference laws, including taxes and fees, apply.

§ 170.917 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

§ 170.920 What is the purpose of the provisions relating to emergency relief?

Sections 170.920 through 170.927 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.

§ 170.921 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, that 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.

§ 170.922 How can States get Emergency Relief Program funds to repair IRR System damage?

States 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.

§ 170.923 What qualifies for ERFO funding?

(a) Tribes can use ERFO funding to repair damage to IRR transportation facilities (including 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 determines eligible repairs under 23 CFR 668, subpart B.

(1) Examples of natural disasters include, but are not limited to, floods, earthquakes, tornadoes, landslides, avalanches or severe storms, such as saturated surface conditions and high-water table caused by precipitation over an extended period of time.

(2) 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.

(b) Structural deficiencies, normal physical deterioration, and routine heavy maintenance do not qualify for ERFO funding.

§ 170.924 What happens if DOT denies an ERFO claim?

The appealing tribe or the facility owner (if the tribe is not the owner) may appeal the finding or determination to the Secretary of Transportation at: FHWA, 400 7th St., SW., HFL-1, Washington, DC 20590. If the tribe is appealing it must provide a courtesy copy of its appeal to BIA.

§ 170.925 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 authorized ERFO funds may be used to reimburse the construction or maintenance funds expended.

§ 170.926 Can a tribe administer approved ERFO repairs under a self-determination contract or a self-governance agreement?

Yes.

§ 170.927 How can FEMA Program funds be used to repair damage?

(a) A tribe can request FEMA Program funds for emergency repairs to damaged

roads not 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).

(b) Tribes can ask States to seek FEMA Program funds to repair damage to roads not on the IRR System.

Tribal Transportation Departments

§ 170.930 What is a tribal transportation department?

A tribal transportation department is a department, commission, board, or official of any tribal government charged by its laws with the responsibility for highway construction. Tribal governments, as sovereign nations, have inherent authority to establish their own transportation departments under their own tribal laws. 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 regional road engineers, or AASHTO to establish a tribal transportation department.

§ 170.931 Can tribes use IRR Program funds to pay tribal transportation department operating costs?

Yes. Tribes can use IRR Program funds to pay the cost of planning, administration, and performance of approved IRR Program activities (see appendix A, subpart B). Tribes can also use BIA road maintenance funds to pay the cost of planning, administration, and performance of maintenance activities under this part.

§ 170.932 Are there other funding sources for tribal transportation departments?

There are many sources of funds that may help support a tribal transportation department. The following are some examples of additional funding sources:

- (a) Tribal general funds;
- (b) Tribal Priority Allocation;
- (c) Tribal permits and license fees;
- (d) Tribal fuel tax;
- (e) Federal, State, private, and local transportation grants assistance;
- (f) Tribal Employment Rights Ordinance fees (TERO); and

(g) Capacity building grants from Administration for Native Americans and other organizations.

§ 170.933 Can tribes regulate oversize or overweight vehicles?

Yes. Tribal governments can regulate travel on roads under their jurisdiction and 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.

Resolving Disputes

§ 170.934 Are alternative dispute resolution procedures available?

(a) Federal agencies should use mediation, conciliation, arbitration, and other techniques to resolve 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 should resolve disputes at the lowest possible staff level and in a consensual manner whenever possible.

(b) Except as required in 25 CFR part 900 and part 1000, tribes operating under a self-determination contract or self-governance agreement are entitled to use dispute resolution techniques prescribed in:

- (1) The ADR Act, 5 U.S.C. 571–583;
- (2) The Contract Disputes Act, 41 U.S.C. 601–613; and
- (3) The Indian Self-Determination and Education Assistance Act and the implementing regulations (including for non-construction the mediation and alternative dispute resolution options listed in 25 U.S.C. 4501 (model contract section (b)(12)).

§ 170.935 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 BIA Regional Director or the Chief of 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 legal basis for the dispute.

(b) ADR proceedings will be governed by procedures in the ADR Act and the implementing regulations.

Other Miscellaneous Provisions

§ 170.941 May 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 IRRTPS;

(e) Access Transportation Research Information System Network (TRISNET) database; and

(f) Participate in transportation research activities under Intergovernmental Personnel Act agreements.

§ 170.942 Can a tribe use Federal funds for transportation services for a tribe's Welfare-to-Work, Temporary Assistance to Needy Families, and other quality-of-life improvement programs?

(a) A tribe can use IRR Program funds:

- (1) To coordinate transportation-related activities to help provide access to jobs and make education, training, childcare, healthcare, and other services more accessible to tribal members; and
- (2) As the matching share for other Federal, State, and local mobility programs

(b) To the extent authorized by law additional grants and program funds are available for the purposes in paragraph (a)(1) of this section from other programs administered by the Departments of Transportation, Health and Human Services, and Labor.

(c) Tribes should also apply for Federal and State public transportation and personal mobility program grants and funds.

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