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NEW ROADS OF OPPORTUNITY FOR INDIAN COUNTRY: Tribal Self-Governance comes to the U.S. Department of Transportation

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Congress Enacts a Multi-year Highway Measure

Congress passed the “Fixing America’s Surface Transportation Act” or the “FAST Act” in December 2015 by overwhelming majorities in both chambers.

President Obama signed the FAST Act into law on December 4, 2015 as Pub. L. 114-94. The FAST Act is the first 5-year highway bill in a decade. The legislation covers authorizations through FY 2020.



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FAST Act

The FAST Act represents a victory for Indian tribes in a very difficult fiscal and political climate. The Act reflects the ongoing struggle in Congress over the role of the Federal government in financing highway and public transportation projects.

Nonetheless, the legislation reflects the success of sustained and unified efforts by Tribes and TOs (such as ITA, NCAI and the TTUC). These efforts educated members of Congress concerning the benefits that accrue to Indian Country by helping Tribal governments build and improve transportation infrastructure and promote highway safety and economic development.

FAST Act Increases Authorization Ceilings above MAP-21

Under MAP-21, Congress appropriated \$41 billion for highways and \$10.7 billion for transit programs in FY 2015. Under the FAST Act, Congress authorizes roughly \$43.5 billion for highways (+5.6%) and about \$12 billion for transit (+10.2%) in FY 2016. In years 2-5 of the FAST Act (2017-2020), authorizations for highways and transit programs will grow at a more modest rate of 2%. Overall, funding for transportation programs increase about 11% over five years. This contrasts sharply, however, with the 45% funding increase that the Administration had sought under the GROW AMERICA Act proposal, which Congress did not adopt.



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Tribal Transportation Program (TTP) Funding

MAP-21

FY 2015 - \$450 mil.

FAST Act

FY 2016 - \$465 mil.

FY 2017 - \$475

FY 2018 - \$485

FY 2019 - \$495

FY 2020 - \$505

This represents a **\$175 million increase** in TTP funding for Tribes over the 5-year authorization from the FY 2015 MAP-21 level.

Tribal Transit Program Funding Increases

- The FAST Act increases Tribal Transit program from \$30 million to **\$35 million** per year.
- \$30 million is authorized for the formula component of the Tribal Transit Program, a **\$5 million increase** over the MAP-21 level.
- \$5 million is set aside annually for the discretionary competitive transit grant program.

This small increase in funding for Tribal transit ensures the program was not “flat-lined” so further increases do not become a political impossibility in the future.

Revisions to BIA PM&O/PRAE and Bridge Funding

Reflecting the desire of Congress to reduce agency operating costs, the FAST Act reduced the statutory “takedown” for BIA/FHWA Project Management and Oversight (PM&O) and Project-Related Administrative Expenses (PRAE) from 6 to 5 percent. The Act increased the “takedown” for the Tribal Bridge Program from 2 to 3 percent. In FY 2016, Bridge funding will increase to about \$14 million from \$9 million.



Increased Reporting Under the FAST Act

The Act increases both tribal and agency reporting obligations:

- Tribes to report annually to Secretaries data concerning the names of projects and activities carried out under the TTP including i) project description, ii) current status, and iii) estimate of jobs created and retained by activity;
- USDOT Secretary to report to Congress, in consultation with DOI and DHHS Secretaries, AG and tribes, within one year of FAST Act (Dec. 2016) on the quality of transportation safety systems and data to improve collection and sharing of data on crashes on Indian reservations; and
- USDOT Secretary to report to Congress, in consultation with DOI and DHHS Secretaries, AG and tribes, within two years of FAST Act (Dec. 2017) concerning options to improve safety on public roads on Indian reservations.

Other FAST Act Provisions

- Nationally Significant Freight and Highway Projects (§1105). An \$800 million program in FY 2016, the new grant program for nationally significant freight and highway projects will allow eligible tribes and consortia of tribes to fund large freight and highway projects (costing at least \$25 mil.). A “small project” set-aside allows projects costing at least \$5 million to be financed with an 80% federal contribution, and there is also a 25% set-aside for rural projects (\$200 million).
- Nationally Significant Federal Lands and Tribal Projects Program (§1123). Program provides up to \$100 million in grants for eligible projects. Project minimum cost is \$25 million, with preference for projects costing more than \$50 million. Federal share is 90% and funds other than title 23 or title 49 may be used to pay the non-Federal share. **Congress did not fund this program in FY 2016!**

Tribal Transportation Self-Governance Program

The FAST Act adds new section 207 to title 23 of the United States Code which requires that the Secretary of Transportation “*shall establish and carry out a program to be known as the tribal transportation self-governance program.*”

The new self-governance program at USDOT will be wholly separate from the self-governance programs within the Department of Interior (title IV) and DHHS (title V) and will operate with its own regulations.



Tribal Transportation Self-Governance Program

The Tribal Transportation Self-Governance Program is modeled on Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-68, which permanently extended the tribal self-governance program to the Department of Health and Human Services (DHHS).

Like Title V, the new law directs the Secretary of Transportation to draft regulations to implement the self-governance program through use of a Negotiated Rulemaking Committee. The Committee is to be comprised of representatives of Indian tribes and the Federal government.

Regulations (§207(n))

Regulations for the implementation of the new USDOT Self Governance program will be through a joint Tribal-Federal negotiated rulemaking process.

Timing:

- ✓ The Secretary must “initiate procedures” to negotiate and promulgate Regulations within 90 days of enactment (published on Apr. 25, 2016);
- ✓ The FAST Act mandates that proposed regulations be issued not later than 21 months after enactment (by September 2017);

Extensions: the date for publication of the proposed regulations can be extended by up to 180 days (March 2018).

Expiration: The authority to issue regulations will expire 30 months from enactment of the FAST Act (May 4, 2018).

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Negotiated Rulemaking Procedures

- ✓ The Negotiated Rulemaking Committee is to be comprised of only Federal and Tribal government representatives, a “majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this title [title 23].” The Federal Register notice is misleading by initially claiming that the Committee may only include representatives of tribes with “existing Title 23 U.S.C. funding agreements with the Department [of Transportation].” *See* 81 Fed. Reg. 24158, 24160 (Apr. 25, 2016). The same notice, however, also restates the statutory criteria (a majority, but not all tribal representatives, to be from tribes with agreements under title 23).
- ✓ The lack of promulgated regulations “shall not limit the effect of this section.”

Announcement and Nominations

On April 25, 2016, FHWA published a Federal Register notice announcing its intent to establish the Tribal Transportation Self Governance Program Negotiated Rulemaking Committee.

- FHWA will select Committee representatives from nominees submitted by Tribes.
- Nominees must be elected tribal leaders or tribal employees authorized by their Tribes to act on the Tribes' behalf.
- Tribal nominations are due June 9, 2016 and should be directed to:
 - By Fed Ex or UPS (do not send by U.S. mail): Robert Sparrow, Director – Office of Tribal Transportation Program, FHWA, Room E61-314, 1200 New Jersey Ave SE., Washington, DC 20590.
 - By Email: FHWA-TTSGP@dot.gov.
- Tribal comments concerning the establishment of the Committee must also be submitted to FHWA (Docket Number FHWA-2016-0002) no later than June 9, 2016 (electronically at <http://www.regulations.gov> or via facsimile to: 1-202-493-2251). See notice for further details.

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Announcement and Nominations, Cont'd

Nominations of a tribal representative by their tribe or Region to serve on the Negotiated Rulemaking Committee must include the following:

- Name, tribal affiliation, job title, major job duties, and employer business address, phone and email;
- Tribal interest(s) to be represented
- Resume reflecting the nominee's qualifications and experience in transportation, negotiated rulemaking process, and existing self-governance regulations;
- Brief description of how the nominee will represent his or her tribal constituent(s).

For more details, carefully review the April 25, 2016 FHWA Federal Register notice.

<https://www.gpo.gov/fdsys/pkg/FR-2016-04-25/pdf/2016-09496.pdf>

Announcement and Nominations, Cont'd

Intertribal and regional representation:

- Based on the Federal Register notice and our conversations with FHWA, FHWA is looking to build a committee with representatives who will represent the interests of regions and tribal groups, rather than just individual tribes.
- This makes:
 - (a) Committee selection easier on FHWA;
 - (b) Increases the number of tribes represented by the selected committee members ; and
 - (c) Increases the legitimacy of the committee's consensus decisions.

Tribal Transportation Self-Governance Program (§207 of title 23)

The extension of the Self-Governance Program to the Department of Transportation has the potential to *transform the Department and Indian country* by speeding the transfer of federal programs, funds and authority to Indian tribes for infrastructure development. The new law should open up new funding opportunities in USDOT agencies that Tribes seldom access.



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USDOT Administrations (those working with Tribes most often are in bold - USDOT Self-Governance Program should expand the list)

- Office of the Secretary (OST)
- **National Highway Traffic Safety Administration (NHTSA)**
- **Federal Aviation Administration (FAA)**
- **Federal Highway Administration (FHWA)**
- **Federal Transit Administration (FTA)**
- Pipeline and Hazardous Materials Safety Administration (PHMSA)
- Motor Carrier Safety Administration (FMCSA)
- Federal Railroad Administration (FRA)
- Saint Lawrence Seaway Development Corporation (SLSDC)
- Surface Transportation Board (STB)
- Maritime Administration (MARAD)
- Office of the Assistant Secretary of Research and Technology (OST-R)

Tribal Transportation Self-Governance Program

Tribes will soon be able to plan, conduct, consolidate, administer and receive full tribal share funding, tribal transit formula funds and funding from USDOT discretionary and competitive grant programs available to tribes and carry out such programs and services *under a single award instrument – the Tribal Transportation Self-Governance Program Funding Agreement* (e.g., FHWA, FTA, FAA, NHTSA, Federal Railroad Admin., Federal Motor Carrier Safety Admin. and Pipeline and Hazardous Materials Safety Admin.).



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Major Provisions of §207

- Eligibility
- Compacts
- Funding Agreements
- General Provisions
- Secretarial Provisions
- Cost Principles
- Transfers of Funds
- Construction Programs
- Secretarial Interpretation & Validity of Existing FHWA-TTP Agreements
- Applicability of ISDEAA provisions

Location of Current Self-Governance Tribes



Eligibility to Participate (§207(b))

1. Tribes request participation in the TTSGP by resolution or other official action by the governing body of the tribe;
2. demonstrate financial stability and financial management capacity for the past three years; and
3. demonstrate transportation program management capability.



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Eligibility Cont'd (§207(b))

- financial stability and financial management capacity:
 - ✓ No uncorrected significant and material audit exceptions in the annual audit of self-determination contracts or funding agreements. (3 fiscal years)
- transportation program management capability:
 - ✓ Demonstrate transportation program management capability, including the capability to manage and complete projects eligible under this title and projects eligible under chapter 53 of title 49.
- **Implementation: Topic for Negotiated Rulemaking**

Compacts (§207(c))

- Compact required. Upon the tribe's request, the Secretary shall negotiate and enter into a written compact;
- Contents. The compact shall set forth the general terms of the government-to-government relationship between the tribe and federal government and other terms that will continue to apply in future fiscal years; and
- Amending a Compact. A compact may only be amended by mutual agreement of the tribe and the Secretary.



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Funding Agreements (§207(d))

Agreement required. Annual funding agreements are required after the compact is entered into. The Transportation Secretary shall negotiate and enter into a written funding agreement with the Tribe.

Contents. A full range of USDOT funding sources and programs (PFSAs) are available for inclusion in the funding agreement which authorize the Tribe to plan, conduct, consolidate, administer and receive funds.

Specific provisions of the AFA will address:

- The receipt of formula funding shares
- The receipt of discretionary and competitive grant awards
- Transfers of State Fed-aid (ch. 1) funds (in addition to §202(a)(9) transfers)
- Flexible and Innovative Financing provisions permitted

Funding Agreements Cont'd (§207(d))

- Terms:
 - Generally identify the PFSAAs to be performed;
 - General budget category;
 - Funds to be provided, including on a recurring basis;
 - Time and method of funds transfer;
 - Responsibilities of the Secretary and the Tribe; and
 - Any other provisions agreed upon by the parties.

Funding Agreements Cont'd (§207(d))

- Subsequent Funding Agreements:
 - Each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.
 - The terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.
- No additional terms or amendments:
 - The Secretary shall not require additional terms in a new or subsequent funding agreement, or revise or amend the funding agreement, without the tribe's consent, except where required by federal law.

General Provisions (§207(e))

- Redesign and Consolidation
 - In general. Tribes may redesign and consolidate PSFAs and reallocate or redirect funds included in a funding agreement in any manner that the tribe considers to be in the ‘best interest of the Indian community being served,’ provided that the funds are expended on projects identified in the Tribe’s Secretarial-approved TIP, the funds are used in accordance with requirements in the appropriations Act, titles 23 and ch. 53 of title 49 and other applicable laws.
 - Exception. If a tribe receives discretionary or competitive grant funds, or receives State apportioned funds, the tribe must use those funds “for the purpose of which the funds were originally authorized.”
 - Retrocession and reassumption provisions.



Secretarial Provisions (§207(f))

- Decision maker. Decisions relating to an appeal of the rejection of a final offer by the Department are to be made by either an official who holds a higher position than the original decisionmaker in the Department, or by an administrative law judge (ALJ).
- Termination. Compacts or funding agreements must include authorization for the Secretary to terminate an agreement in the case that the Secretary makes a finding of:
 - imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety and that arises out of a failure to carry out the compact or funding agreement; or
 - Gross mismanagement with respect to funds or programs transferred under the compact or funding agreement.
 - Written notice, hearing on the record, and chance for corrective action by the Tribe is required before Secretarial termination, except in the case of “imminent substantial and irreparable jeopardy.”
- Burden of Proof. In a hearing or appeal involving a decision to terminate, the Secretary has the burden to prove by “clear and convincing evidence” the validity for the grounds for termination.

Cost Principles (§207(g))

- In administering funds received under a compact and funding agreement, an Indian tribe shall apply cost principles under the applicable OMB circular, except as modified by section 106 of the ISDEAA, 25 U.S.C. 450j-1 (e.g., allowable uses of funds without approval of Secretary), other provisions of law, or by any exemptions to such circulars subsequently issued. **The Uniform Grant Guidance regulations, 2 C.F.R. 200, is the current standard.**
- “No other audit or accounting standards shall be required by the Secretary.”
- Federal claims against a Tribe relating to funds received based on any audit shall be subject to the provisions of §450j-1(f) of the ISDEAA (timeframes for Federal disallowance of costs).

Transfer of Funds (§207(h))

- The Secretary shall provide funds to the tribe in an amount equal to:
 - (a) Tribal shares. The sum of the funding that the tribe would otherwise receive for the PFSA in accordance with the funding formula or other allocation method established under title 23 or chapter 53 of title 49; and
 - (b) Share of BIA PM&O/PRAE funds. Such additional amounts as the Secretary determines equal the amounts that would have been withheld for the costs of the BIA for administration of the program or project.

Construction Programs (§207(i))

- Standards. Construction projects administered by Tribes under a funding agreement out shall be built pursuant to the construction program standards set forth in applicable regulations (e.g., AASHTO, federal or state-approved standards) or as specifically approved by the Secretary.
- Monitoring. Construction programs shall be monitored by the Transportation Secretary in accordance with applicable regulations.



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Secretarial Interpretation and Validity of Existing Agreements (§§207(j) and (k))

- Interpretations. The Secretary shall interpret all federal laws, Executive orders, and regulations in a manner that will facilitate: a) the inclusion of PFSAs and associated funds in compacts and funding agreements; and b) the implementation of the compacts and funding agreements.
- Waivers. Tribes may seek written waivers of applicable regulations by the Secretary. Secretary has 90 days to approve or deny a waiver request or the request is “deemed” approved.
- Validity of existing agreements. Upon a tribe’s election, the Transportation Secretary shall maintain current tribal transportation program funding and program agreements or enter into new agreements under authority of section 202(b)(7). If you like it, keep the agreement you have.

Applicability of ISDEAA Provisions (§207(l))

Certain provisions of titles I and V of the ISDEAA, except where in conflict with §207 as determined by the Secretary, also apply to compacts and funding agreements negotiated with the USDOT Secretary at the Tribe's election. These include such provisions as:

- ✓ Conflict of interest standards
- ✓ Records (not federal)
- ✓ “final offer” and rejection of final offer (notice and hearing)
- ✓ Trust responsibility
- ✓ Multi-year funding agreement
- ✓ Prompt Payment Act
- ✓ Interest retention
- ✓ Limitations of Cost clause
- ✓ Federal procurement laws
- ✓ Direct access to excess Fed. property
- ✓ Civil action under 25 U.S.C. §450m-1
- ✓ Matching or cost participation
- ✓ Favorable rules of construction
- ✓ No funding reductions and trust responsibility
- ✓ 20 title I provisions, not in conflict with §207, apply to compacts and agreements (e.g., allowable uses w/o Secretary approval, FTCA coverage); tribes may request to include other title I provisions not in conflict with §207 (issues for rulemaking committee to resolve in proposed rule for TTSG Program).

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Goal of the USDOT Negotiated Rulemaking Committee

According to the Federal Register (FR) announcement:

- The Committee's goal is to develop regulations to implement the USDOT Tribal Transportation Self-Governance Program "in accordance with 23 U.S.C. §207 (i.e. the FAST Act statutory provisions discussed above.)"
- The Committee should operate by "consensus" but Committee members may have some leeway in defining "consensus" as something less than unanimous agreement.
- The Committee must develop regulations covering the main statutory topic areas discussed above.

Role and Responsibilities of the Tribal Committee Members

According to the Federal Register announcement:

- Committee members will not be paid, but they will be reimbursed for travel expenses and per diem costs.
- Due to the complexity of the rulemaking topic, Committee members must be willing to attend all meetings and alternative representatives will not be allowed to stand in for the Committee member “without the prior written approval of the Department.”
- An appointed Committee member may be removed or replaced if the member fails to attend two consecutive meetings or four total meetings.

Logistics for the USDOT Negotiated Rulemaking Committee

According to the Federal Register announcement:

- A maximum of 25 members will be appointed to serve on the Committee, with the goal of having a wide range of tribal and federal interests and points of view represented.
- USDOT estimates that 10-12 Committee meetings will be required to complete a proposed rule by the September 2017 deadline.
- National Committee meetings will last 3-4 days, and there may also be smaller regional tribal meeting to provide status reports on the Committee's activities.

Logistics for the USDOT Negotiated Rulemaking Committee

According to the Federal Register announcement:

- Most Committee meetings will be held in **Albuquerque, New Mexico**, as a cost-saving measure and because of the location's proximity to many Tribes and BIA regions.
- Other meeting locations may be chosen if they are no more expensive than the Albuquerque location and have been approved by the full Committee.
- All tribes, tribal organizations and consortia are also welcome to attend Committee meetings and submit comments to the Committee.

Logistics for the USDOT Negotiated Rulemaking Committee

According to the Federal Register announcement:

- USDOT will retain a neutral facilitator to assist the Committee members in reaching agreement on the proposed regulations (at least for the first meeting and likely additional meetings).
- The FHWA-Federal Lands Highway Office will provide administrative and technical support to the Committee.
- At the first meeting, Committee members will receive negotiated rulemaking training, appoint leaders and establish protocols and schedules for future meetings.

Tribal Strategy for the Negotiated Rulemaking Committee

Well-organized and united tribal advocacy succeeded in bringing tribal self-governance laws to the USDOT through the FAST Act. This same united effort is needed during the negotiated rulemaking process to develop tribally-beneficial regulations to implement these laws.

Tribal representatives should consider meeting regularly in tribal caucuses to develop unified tribal positions whenever possible, particularly on critical issues such as “program eligibility” and the expansion of self-governance principles to all branches of USDOT, especially those agencies which have rarely worked with Tribes in the past.

Recommendations for Self-Governance Negotiated Rulemaking

Among other things, we would like Tribal Committee members to consider advocating for the development of a “model” USDOT Self-Governance Compact and Annual Funding Agreement (AFA) to be drafted by the Committee and included in the final regulations.

The final rule should make it clear that all Tribes have the option of developing their own compact and AFAs, but we believe a well-crafted and tribally-protective “model” compact and AFA would provide great value to tribes and tribal organizations by establishing minimum standards and agreement wording that USDOT would be required to accept (a concept similar to the existing FHWA TTP Agreements and BIA G2G Agreements).

Recommendations for Self-Governance Negotiated Rulemaking

In addition, we recommend that the new regulations:

- Ensure that the “transportation program management capability” eligibility requirement is reasonable and not overly restrictive.
- Establish an Office of Tribal Self-Governance to ensure that all USDOT modal agencies fully comply with the tribal self-governance mandate.
- Further define the responsibilities of the Tribal Transportation Program Coordinating Committee under the USDOT Self-Governance Program.
- Set out the procedures by which Federal-aid and other transportation funds may be transferred to tribes under §202(a)(9) of title 23.
- Require USDOT to provide GSA web access (GSAccess) to tribes and grant them legal title to any surplus/excess federal equipment (currently USDOT resists granting legal title to tribes).

Beyond Self-Governance Negotiated Rulemaking

In addition to developing important regulations, negotiated rulemaking offers Tribal leaders and advocates direct and regular access to senior USDOT officials.

Negotiated rulemaking is a great opportunity for Tribes to come together to educate Federal officials – including those in the next Administration – about tribal goals, needs and future expectations for growth in the transportation area.

Tribes were able to secure significant funding increases and program improvements in SAFETEA-LU and ARRA, largely as a result of the common bonds that were forged through the IRR Program Negotiated Rulemaking Committee process.

We urge Tribal Committee representatives and others attending these meetings to learn best practices from each other and work for the common good of all Tribes in the transportation arena throughout this process and beyond to the next highway bill.

Deputy Assistant Secretary for Tribal Government Affairs

At our urging, many Tribes wrote to President Obama and Secretary Foxx to urge the President to appoint the *first* Deputy Assistant Secretary for Tribal Government Affairs within USDOT. The duties of the DAS are to coordinate tribal transportation programs and activities in all offices and administrations of the Department and participate in any negotiated rulemaking relating to the Tribal Transportation Program. We believed it was an important *precedent* for President Obama to fill this position before he left office.

Thanks to Tribal advocates, particularly our Coalition clients, other tribes, officials in the Executive Office of the President and Congressman Pete DeFazio (D-OR), **we are pleased to report that President Obama has appointed Kenneth Martin as the first DAS for Tribal Government Affairs.** Mr. Martin is a former aide to Sen. Tim Johnson (D-SD) and the current Minority Policy Director for the Senate Committee on Indian Affairs. He will start in his new position on May 16, 2016. *Indian Country's 11 year wait to fill this position has finally come to an end!*

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Questions?

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