

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

COMMENTS ON
TRIBAL TRANSPORTATION PROGRAM

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TRIBAL CONSULTATION SESSIONS

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Tuesday,
January 27, 2015

Embassy Suites Minneapolis Airport
7901 34th Avenue South
Bloomington, MN 55425

The above-entitled matter commenced at
the hour of 9:00 a.m., Andrew S. Caulum,
presiding.

PRESENT:

ANDREW S. CAULUM, Attorney-Advisor, Department of
Indian Affairs

LeROY M. GISHI, Chief, Transportation, Division
of Transportation, Department of the
Interior

ROBERT W. SPARROW, Director, Tribal
Transportation Program, Federal Highway
Administration

VIVIAN A. PHILBIN, Assistant Chief Counsel,
Federal Lands, Department of Transportation

SHELDON O. KIPP, Supervisory Highway Engineer,
Department of the Interior

MARTHA SMITH-GHODOUMIPOUR, Program Analyst, BIA

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:03 a.m.)

3 MR. CAULUM: Good morning.

4 (Chorus of good mornings.)

5 MR. CAULUM: All right, everybody is
6 awake, okay.

7 Welcome to the consultation on the
8 notice of proposed rulemaking for 25 CFR Part
9 170. My name is Andy Caulum, I work for the
10 Solicitors Office, Division of Indian Affairs in
11 Washington, D.C. One of my primary areas that I
12 work on, as many of you know, is the Tribal
13 Transportation Program and the BIA Division of
14 Transportation generally.

15 As some of you may know, I'm from the
16 Upper Midwest, I grew up in Madison, Wisconsin
17 and spent a lot of time in Northern Wisconsin to
18 present to the tribe there and actually was there
19 last weekend, enjoyed it very much. Not enough
20 snow to go, well, there was enough snow but not
21 just enough snow to go snowmobiling and really
22 enjoy it. A lot of gravel you can see exposed

1 and stuff, so I'm not doing that.

2 My colleagues in Washington are on a
3 two-hour delayed arrival because they got about
4 an inch of snow out there. So, that's amusing
5 for a Wisconsin boy to watch that. Last year we
6 had been called off work because they were so
7 worried about a big snow event, and it rained in
8 D.C. So, that was even more amusing. And
9 unfortunately, I got to stay at home and tele-
10 work all day.

11 So, at any rate, I'm very happy to be
12 in Minneapolis, and welcome to everybody here.
13 As I said, my name is Andy Caulum, I work with
14 the Solicitors Office, Division of Indian
15 Affairs. My colleagues here are with me: LeRoy
16 Gishi who many of you know, Chief of the Bureau
17 of Indian Affairs Division of Transportation; Bob
18 Sparrow, Director of the Tribal Transportation
19 Program in Federal Highway; Ms. Vivian Philbin
20 who works with the Office of Chief Counsel for
21 Federal Lands Highway; Mr. Sheldon Kipp who works
22 with Mr. Gishi at the BIA Division of

1 Transportation in their central office in
2 Albuquerque, New Mexico; and Martha Ghodoumpour
3 who works with Leroy in Washington, D.C. and in
4 some days is my nemesis because if I haven't
5 surnamed something, she'll just show up in my
6 doorway in my office, look at me without saying a
7 word, I'll raise my head, she'll just look at me
8 and go where is my surname? And that means that
9 you better get it done because Martha will be
10 your worst nightmare until you do, but in a very
11 happy way.

12 So, at any rate, welcome! We just
13 want to go through a few housekeeping things, and
14 then we also want to make sure we have an
15 opportunity to let everybody introduce themselves
16 here, and then we'll move along with our agenda.

17 First, this is a formal consultation.
18 The Assistant Secretary of Indiana Affairs
19 approved six consultation sessions on the
20 Department's proposed rule for rewriting, or for
21 revising 25 CFR 170, and we'll talk about the
22 locations that we have done so far and that we

1 will do. We have a, this is a formal meeting, we
2 have a court reporter here. He is taking down,
3 he will be converting this to a written record.
4 All of this is being recorded via some
5 microphones here; you all can hear us as well.
6 So, when you rise to speak, if you have a
7 comment, please make sure you introduce yourself.
8 If you are talking multiple times, I know it's a
9 little repetitive, but to make sure we have an
10 accurate record, please introduce yourself. And
11 if you are here representing a particular tribe,
12 please let us know that as well. And if you're
13 here individually, that's fine, too, you don't
14 have to say you're representing a particular
15 tribe.

16 How and when questions will be taken?

17 We're happy to take questions throughout the
18 process. There will be a presentation, but in
19 some cases we may respond by saying that your
20 question will be addressed maybe a couple of
21 slides down the presentation, so we might ask you
22 in some instances to hold the question because it

1 might get answered in a few moments and then that
2 might help. And then obviously, you're always
3 still welcome to make that comment even when we
4 get to that slide.

5 We have handouts available. Everybody
6 should have a handout of the proposed rule as
7 well as the entire PowerPoint presentation.
8 You'll find that the PowerPoint presentation has
9 also been uploaded on -- is it your website,
10 LeRoy? Or is it the regulations website? I
11 forget.

12 MR. GISHI: It's the consultation
13 website.

14 MR. CAULUM: It's the consultation
15 website. So, what you're seeing here today, this
16 presentation was effectively frozen as of our
17 first consultation session in Sacramento, so this
18 is the exact same presentation that was presented
19 there as well as Phoenix. Here, we will be
20 presenting in Oklahoma City, Anchorage and
21 Seattle.

22 Meeting expectations. We are going to

1 get through the entire agenda that you see listed
2 in the NPRM and sort of however long it takes.
3 What we found so far is we do have plenty of time
4 to get through it. At the end, we will close the
5 consultation, we will notify you of that, and
6 then Mr. Sparrow and Mr. Gishi will give an
7 update on the status of MAP-21 and its current
8 extension which many of you know expires at the
9 end of May and some other sort of MAP-21 what's
10 going on today related stuff.

11 And then introduction. As I said, my
12 name is Andy Caulum. We'd like to go around the
13 room and ask you to introduce yourself. If you
14 don't plan to do so, that's fine. But if you are
15 going to rise to speak, we need to know who you
16 are. So, if we could start, let's see, the back
17 right corner? Oh, I'm sorry.

18 MR. KIPP: Andy, over there.

19 MR. SPARROW: How about the front left
20 corner?

21 MR. CAULUM: How about the front left
22 corner where Sheldon has the microphone?

1 PARTICIPANT: My name is -- Northern
2 Cheyenne Tribe.

3 MR. ROBINSON: I'm Tracy Robinson,
4 Tribal Council, Northern Cheyenne Tribe.

5 MS. SPEAR: Good morning. I'm Janis
6 Spear with the Northern Cheyenne Tribe.

7 MR. BROWN: Good morning. Howard
8 Brown, Shoshone and Arapaho Tribe.

9 MR. BOWMAN: Mike Bowman, NECI.

10 PARTICIPANT: Good morning. Jule --
11 Tribe.

12 MR. ROUSSEAU: Rick Rousseau, Cheyenne
13 River Sioux Tribe.

14 PARTICIPANT: Good morning. Tom --
15 Great Plains Regional Office. Thank you all for
16 being here.

17 MS. DAUGHERTY: Danelle Daugherty,
18 Great Plans Regional Office, Deputy Regional
19 Director, Indian Services.

20 MR. THOMPSON: Nate Thompson, Federal
21 Highway Administration.

22 MR. BLACKDEER: Good morning. Brett

1 Blackdeer, Ho-Chunk Nation.

2 MS. CLOUD: Good morning, everybody.

3 My name is Heather Cloud. I'm with the Ho-Chuck

4 Nation. I just want to say welcome to some of

5 our native Ho-Chunk lands that we've had many

6 attempts to remove us and we kept coming back.

7 And we have two wonderful representatives here in

8 this home territory. And so, I just want to say

9 I hope that we have a great day and thank you.

10 MS. THOMPSON: I'm Connie Thompson,

11 I'm the Transportation Planner for the Fort Peck

12 Tribes.

13 PARTICIPANT: (Indian introduction.)

14 How do you spell that? Good morning, my name is

15 Tommy Christian, I'm a Tribal Executive Board

16 Member of Fort Peck Assiniboine and Sioux Tribes.

17 MR. KIRSCH: Jim Kirsch, Fond du Lac

18 Reservation.

19 MR. BLACKDEER: Good morning. My name

20 is Garrett Blackdeer, Ho-Chunk Nation.

21 MR. SPRINGER: Hi, Tom Springer,

22 outside counsel, Ho-Chunk Nation.

1 MS. LONE TREE-WHITERABBIT: Good
2 morning, everyone. It's great to see you all
3 again. My name is Kathleen Lone Tree-
4 Whiterabbit, and I am a proud member of the Ho-
5 Chuck Nation and their clan. And I would like to
6 welcome you to the our Twin Cities area. I am
7 one of 13 legislators for the Ho-Chunk Nation,
8 and I am proud to say we have a tremendous
9 delegation with us today at this BIA roads
10 meeting. So, go team Ho-Chunk!

11 And we have a number of legislators
12 present from our various districts. We have five
13 districts, four of them are located within the
14 state of Wisconsin and District 5 which is our
15 district. It's all the states and everything
16 beyond the state of Wisconsin. And we do have
17 roads in Minnesota and Illinois as well.

18 So, I want to just say welcome and
19 thank you for coming.

20 MR. WHITERABBIT: Good morning.
21 Forrest Whiterabbit from the Ho-Chunk Nation.
22 I'm a legislator, and I welcome you to the good

1 earth country.

2 MR. GARVIN: Good morning. Henning
3 Garvin, I'm a District 2 representative. I'm a
4 Ho-Chunk Nation legislator.

5 MR. BLACKDEER: Good morning. My name
6 is Greg Blackdeer, a Ho-Chunk Nation District I
7 representative.

8 MR. GREENDEER: (Indian greeting.) My
9 name is John Greendeer. I am President of the
10 Ho-Chunk Nation. Good morning, everybody.

11 PARTICIPANT: Good morning. Ryan --
12 of the Ho-Chunk Nation.

13 MR. LONNES: My name is Dan Lonnes of
14 --

15 MR. ELLISON: Stan Ellison, Director
16 of Land and Natural Resources for the Shakopee
17 Sioux Community.

18 MR. SCHRADER: Good morning. Jon
19 Schrader, Transportation Planner for the Ho-Chunk
20 Nation.

21 MR. BRANCHAUD: Dean Branchaud, Red
22 Lake Nation.

1 MR. KENNEDY: Good morning, everyone.
2 Todd Kennedy, BIA Midwest Region.

3 MR. FREDEMBURG: Kurt Fredenburg,
4 Bureau of Indian Affairs, Transportation.

5 MR. HEWITT: Good morning, everyone.
6 Scott Hewitt, BIA Midwest Region.

7 MR. SLETTVEDT: Good morning. Kurt
8 Slettvedt, BIA Midwest Region.

9 MR. CHASE: Good morning. Art Chase
10 --

11 MR. LOOSEMORE: Aaron Loosemore, BIA
12 Midwest Region.

13 MR. KELLY: (Indian greeting.) Dave
14 Kelly, BIA Oglala Sioux Tribe, Department of
15 Transportation, Director.

16 MS. DAMERON: Teresa Dameron,
17 Consultant to Traditional Eagle Solutions.

18 MS. LEE: Darlene Lee, Consultant to
19 Traditional Eagle Solutions.

20 MR. BRONCHO: Anthony Broncho,
21 Shoshone-Bannock Tribe, Transportation Director.

22 MR. VIVIER: Good morning. Jeff

1 Vivier, White Earth Indian Reservation --

2 MR. EBERHARDT: Good morning. Cliff
3 Eberhardt. (Indian greeting.)

4 MR. SWADER: Good morning. Tony
5 Swader, Grand Portage Band of Chippewa, Trust
6 Land and Resources.

7 MR. HOLLINDAY: Good morning. Jason
8 Holliday, Planning Director, Fond du Lac Band of
9 Lake Superior Chippewa.

10 MR. OLSUFKA: Good morning. Jake
11 Olsufka, Ponca Tribe of Nebraska.

12 MR. BIRD: Good morning. Richard
13 Bird, Standing Rock Sioux Tribe, Transportation
14 Planning and Development.

15 MR. JAFFE: Good morning. I'm Matt
16 Jaffe, I'm with the Sonofsky, Chambers, Sachse,
17 Endreson & Perry law firm, representing a
18 consortium of Indian tribes.

19 MR. MOGAN: Good morning. Marc Mogan,
20 Tribal Engineer for Prairie Island Indian
21 Community.

22 MR. BENTON: Good morning. Jeff

1 Benton, Red Cliff Band Lake Superior Chippewa.

2 MR. FRONK: Hi, Tom Fronk, Indian
3 Affairs.

4 MS. SHERK: Hi, Dawn Sherk, White
5 Earth Nation, Assistant Public Works Director.

6 MR. NARVAEZ: Guillermo Narvaez,
7 University of Minnesota.

8 MR. FERRIS: Kade Ferris, Red Lake
9 Nation.

10 PARTICIPANT: I'm representing the
11 Office of the President of the Rosebud Sioux
12 Tribe.

13 MR. CRASCO: Good morning. David
14 Crasco, Fort Belknap, Tribal Councilman --
15 Public Safety.

16 MR. HEALY: Good morning, everybody.
17 John Healy, Director of Transportation, Fort
18 Belknap.

19 MR. GARRIGAN: Jim Garrigan, President
20 of --

21 MR. SMITH: Good morning. John Smith,
22 Transportation Director, Shoshone and Arapaho

1 Tribes. On behalf of Shoshone and Arapaho
2 Tribes, I'd like to use your record, this is not
3 a true consultation.

4 MR. SCHEINOST: Good morning. Brian
5 Scheinost, Director of Public Works for the Mille
6 Lacs Band.

7 MIKE MOILANEN: Good morning. Mike
8 Moilanen, Mille Lacs Band of Ojibwe.

9 MR. KIPP: Good morning. Sheldon
10 Kipp, Bureau of Indian Affairs, Division of
11 Transportation, Central Office, Albuquerque, New
12 Mexico.

13 MR. MCKNIGHT: Good morning. My name
14 is Sean McKnight, I represent -- Incorporated out
15 of Nome, Alaska.

16 MR. GISHI: LeRoy Gishi, BIA
17 Transportation.

18 MR. SPARROW: Good morning, everybody.
19 I'm Bob Sparrow. I'm the Director of the Tribal
20 Transportation Program for Federal Highway in
21 Washington, D.C.

22 MR. CAULUM: Again, I'm Andy Caulum,

1 Solicitors Office, Division of Indian Affairs,
2 Washington, D.C.

3 MS. PHILBIN: Good morning, everyone.
4 I'm Vivian Philbin, Federal Highway
5 Administration out of Lakewood, Colorado.

6 MR. CAULUM: Next, let me just -- did
7 we miss anybody? Right there. I thought you
8 could sneak in.

9 MR. BUCKLES: Danny Buckles, Fort Peck
10 Tribes, Tribal Executive Board Member.

11 MR. GREENDEER: Gary Greendeer, Ho-
12 Chunk Nation.

13 MR. CAULUM: And let me just extend a
14 special welcome to the tribal leaders who have
15 come to join us today. We really appreciate you
16 taking the time out from your busy schedules to
17 come to the consultation on the road regulation.

18 I will now turn it over to Mr. Bob
19 Sparrow. And I also want to recognize John
20 Smith, and we were waiting for that comment,
21 thank you very much. But we'll move forward with
22 the formal tribal consultation that apparently

1 isn't tribal consultation. Thank you, John.

2 MR. SPARROW: All right. Can
3 everybody hear me all right? All right. I'm
4 from Verizon, can you hear me now?

5 All right. You're going to see a tag
6 team of presenters over the next few hours, and
7 we're going to be just going back and forth and
8 presenting everything to you.

9 This is the agenda that was
10 established, this is what was put in the Federal
11 Register notice. As Andy alluded to previously,
12 we've done two of these consultations two weeks
13 ago. We have met the time line without a
14 problem. We have ample time in the past for
15 those last two subparts, Subpart G and A. We
16 have not made it through everything before lunch
17 but we more than caught up in the afternoon. So,
18 I don't anticipate any problem in meeting the
19 agenda.

20 Once we, as Andy said, once we close
21 out the formal consultation, LeRoy and I will do
22 a short presentation on the Tribal Transportation

1 Program, where it stands now with regards to
2 funding, what's going on in Washington, D.C.,
3 some of the set-asides in the pending awards and
4 things like that, just to kind of let you know
5 where things are in D.C. at this point.

6 So, why are we here? The
7 Transportation Equity Act, TEA-21 as we all know
8 it, directed the Secretary of the Interior to
9 enter into negotiated rulemaking to develop
10 program regulations and establish a funding
11 formula for what was then called the Indian
12 Reservation Roads Program. And 25 CFR was
13 developed through that negotiated rulemaking
14 process and has been published in July 2004. And
15 also, TEA-21 established the formal IRR bridge
16 program as a set-aside of that new program.

17 So, that all came out in 1998. 25 CFR
18 170 was published in 2004, became effective in
19 fiscal year 2005, and then along comes SAFETEA-LU
20 right after the publication, Safe, Accountable,
21 Flexible, Efficient Transportation Equity Act, a
22 Legacy of Users. Now, one thing I want you to

1 look at is how the names keep getting more and
2 more, they kind of swing back and forth and I'll
3 get back to that in a minute, but I just kind of
4 find it interesting. We went from Transportation
5 Equity Act to this, you know, big long acronym
6 and everything else, but we'll get back into
7 that.

8 So, when SAFETEA-LU was passed in
9 2005, it changed, it made some significant
10 changes to the IRR Program. It provided an
11 opportunity for eligible tribes to enter into
12 funding agreements directly with Federal Highway.
13 When the reg was developed prior to SAFETEA-LU,
14 Federal Highway was not part of the program per
15 se, wasn't in the game as far as working directly
16 with tribes. So, that changed.

17 It allowed 25 percent of each tribe's
18 share to be used for maintenance. Again, prior
19 to this and when the reg was written, maintenance
20 was not an eligible activity for the IRR Program
21 funds. It identified the amounts that would be
22 set aside for program management and oversight.

1 It allowed tribes to approve their PS&Es after
2 certain conditions were met. It identified the
3 National Tribal Transportation Facility
4 Inventory, and then it took that bridge program
5 which was developed as a set-aside back in 1998
6 and made it a stand-alone program.

7 And that was authorized through 2009.
8 And then subsequently, as many of you are aware,
9 SAFETEA-LU was actually extended nine times out
10 through 2012.

11 So, when SAFETEA-LU was passed, the
12 BIA and Federal Highway moved ahead to update 25
13 CFR 170 to reflect the changes that were made to
14 the program as a result of SAFETEA-LU. But by
15 the time all of that was put together,
16 unfortunately, the administrations were going to
17 be changing. There was national elections coming
18 up for the President. And about a year before
19 those elections took place, the administration
20 said we're not doing any regulations, we're not
21 doing NPRMs, we're not making any changes. So,
22 that effort was stopped due to the changes in the

1 administration.

2 Presidential elections take place.
3 President Obama comes in and is elected. And
4 that new administration comes in and it takes
5 several months for that new administration to
6 come in. But then, once we got to that point of
7 February, March, April, SAFETEA-LU was expiring
8 that following September. So, because it was
9 expiring, and at that time we didn't know it was
10 going to be extended nine times, because it was
11 expiring, we just kind of held back to see what
12 was going to happen. So, that's what happened
13 prior to that.

14 And then we get to Moving Ahead for
15 Progress in the 21st Century Act, MAP-21. Now
16 it's passed in 2012. Additional changes to the
17 IRR Program are made. Changed the program name
18 from Indian Reservation Roads Program to the
19 Tribal Transportation Program. And we have a
20 little bucket that during these meetings or
21 consultations, anybody of us who say Indian
22 Reservation Roads or IRR by mistake, we have to

1 put a dollar in the bucket. And we've got about
2 \$20 in there so far just after two consultations.
3 Those of us that were involved in IRR for a long
4 time, it's hard to change that acronym, not in
5 our heads.

6 So, it changed the name to the Tribal
7 Transportation Program. It replaced the existing
8 funding formula that was developed through the
9 negotiated rulemaking with the statutory funding
10 format. Congress said and directed \$450 million
11 that was authorized for the program was exactly
12 how those funds are going to be distributed to
13 the tribes. They gave us a new funding formula,
14 exact percentages, it provided exactly what was
15 going to be used as the factors of the formula,
16 and in essence took away the existing formula
17 that was developed through that negotiated
18 rulemaking.

19 It increased the amount of funding
20 that a tribe could use for maintenance activities
21 from 25 percent. We'll talk about that later as
22 we go through this. So, it provided more options

1 or allowed more funding to be used from agencies.
2 It further clarified what the National Tribal
3 Transportation Facility Inventory was and how it
4 was going to be used.

5 It removed the high priority projects
6 program from IRR and reestablished it as a stand-
7 alone program funded through the general funds.
8 So, the high priority program that was part of
9 IRR and part of 25 CFR 170, Congress told us to
10 remove that, and they took it and they made it
11 its own separate program. But it's not funded
12 with the Highway Trust Fund, it's funded through
13 what they call the general fund, and because of
14 that Congress has to take an additional action in
15 order to provide the funding for that program.
16 And Congress has not provided the funding since
17 the inception of MAP-21. So, the program is out
18 there but it has not been funded.

19 It established a new set-aside for
20 travel safety projects and activities, and it
21 established the authority for tribes to receive
22 federal aid funds directly from a state to carry

1 out the work through an agreement either with BIA
2 or Federal Highway Administration. So, now
3 there's additional major changes and the reg is
4 falling even farther behind.

5 So, BIA and Federal Highway worked
6 together again and began updating 25 CFR to
7 reflect the current laws and the operational
8 processes. And when you think about it, the
9 processes that were in place back in the early
10 2000's when all this was carrying on, when the
11 original 25 CFR 170 was developed, versus the
12 processes and the electronic and the computer and
13 the Internet and everything else that's available
14 today, there were some processes that had to be
15 updated to reflect how the work was actually
16 being carried out. So, although all parts of 25
17 CFR were reviewed, only the sections requiring
18 updates due to changes in the law, these updated
19 operations I was talking about, or an improved
20 policy clarification that was developed by the
21 coordinating committee since it started back in
22 2006, only that part of it was modified.

1 And then further coordination with the
2 coordinating committee took place during the
3 development of the draft. And we had a few
4 meetings that took place. We developed a draft
5 NPRM and that was published in the Federal
6 Register in April of 2013. And three
7 consultation sessions were carried out in
8 Anchorage, Phoenix and here in Minneapolis for
9 that draft update.

10 So, the comments were received, the
11 changes to the draft were made, and the NPRM
12 we're discussing today was published in the
13 Federal Register on December 19th. The comments
14 are posted on the BIA website that were received
15 during the draft process. So, those comments
16 will be coming in today and I'll get to that in a
17 minute.

18 Two versions of the NPRM were made
19 available at the BIA website, actually it was
20 posted in December 12th of 2014 in the Federal
21 Register publication in December 19th of 2014.
22 There were a few subtle differences

1 unfortunately. We primarily added format changes
2 but two sections were modified. Subpart C-
3 170.202(d), the statutory reference to the date
4 of MAP-21, and that went in effect as of July
5 5th, 2012, was removed.

6 You'll see that if you go in to the
7 BIA website, is it still up there or did we take
8 it down, the BIA website?

9 MR. CAULUM: Which one?

10 MR. SPARROW: The original one.

11 MR. CAULUM: It's still on there.

12 MR. SPARROW: That's up there. So,
13 the difference of what was originally posted and
14 what was in the Federal Register, the Federal
15 Register in essence took out in effect as of July
16 5th, 2012 out of what we sent to them, we never
17 expected them to do an edit once we sent it to
18 them, we expected them to just publish it. And
19 since then, we've talked to them, the DOI folks
20 have gone back to say, no, this reference needs
21 to stay to help further clarify some time frames
22 for the MAP-21 funding formula.

1 And then Subpart C 170.226(b), the
2 word "proposed" was deleted from the language.
3 And as we said, in this case, proposed means new
4 and not previously approved.

5 So, Andy, I think I actually went one
6 slide too far, and I'm going to turn this back
7 over to you to finish up and talk about the
8 preamble.

9 MR. CAULUM: So, why are we here
10 today? Well, first of all, we want to present
11 the proposed rule and point out the proposed
12 changes to 25 CFR 170. Most importantly, we want
13 to listen to and record your comments.

14 One brief aside, just as a one little
15 side housekeeping measure, a bunch of two things.
16 One, anybody that's here from the Federal
17 Government, from BIA in particular, your comments
18 should be made through your supervisors, they're
19 region road engineers. And then they can send
20 those in to us. This opportunity here is for
21 tribal leadership and the general public to make
22 comments on the rule.

1 And then secondly, one thing I didn't
2 mention earlier, when you do get up to speak, if
3 your name is a little unusual spelling, Cloud
4 would probably be perhaps an unusual spelling,
5 but if you had a different last name spelling,
6 make sure we have that in the record. If you can
7 spell it for the court reporter, that would be
8 great.

9 Next, with respect to the work and
10 effort that took place in the development of 25
11 CFR 170, only the following are included in the
12 NPRM. Statutory changes, even though the current
13 rule was the result of negotiated rulemaking,
14 Congress when it passed SAFETEA-LU, in effect by
15 changing the law, made some changes to 25 CFR
16 170, because the regulation never conflicted with
17 the statute that it interpreted. So, we looked
18 at statutory changes that were made in the
19 regulation and, in compliance with current law,
20 updated with respect to the operational
21 procedures.

22 One thing that we've been pointed at

1 the required meetings and actually just only
2 about six months ago did I realize how
3 dramatically the delivery of the Tribal
4 Transportation Program has changed. Since the
5 advent of BIA's program agreements and Federal
6 Highway's program agreements as we call them, or
7 otherwise known as G2G agreements, just since
8 2011 I believe it was, was the first full year
9 that we had BIA's program agreements in place.
10 So, we've gone from zero tribes to about 150 for
11 BIA total. And Federal Highway is at, I think
12 128 right now.

13 So, there's only 500, well, not only,
14 there 566 federally-recognized tribes in the
15 United States. So, right now you're at half.
16 Actually more than half almost of the federally-
17 recognized tribes. A completely different, or an
18 agreement that didn't exist when the 25 CFR 170
19 was published in 2004, so it's been a sea of
20 change in the way the program is now being
21 delivered to tribes and the funds are being
22 delivered to tribes. So, it's definitely

1 something we want to look at and recognize.

2 Also, policies that the IRR Tribal
3 Transportation Coordinating Committee developed
4 and passed by a consensus, they were ultimately
5 approved by the secretaries. OMB has changed
6 some rules at the Federal Register regarding what
7 is allowed in an NPRM rule. No material may be
8 included called "for information only." The
9 result is that all the "for information only"
10 material that was included in the original 25 CFR
11 170 is not in this NPRM. The material will also
12 not be included in the updated 25 CFR 170. Use
13 of appendices have been minimized, and much of
14 this information will be available on the BIA and
15 Federal Highway website.

16 We did get some, I think very good
17 comments on the issue of the reference material
18 that I think will generate some discussion when
19 we go to finalize the rule. And the discussion
20 we're going to have to have is going to be with
21 the Federal Register. The way the Federal
22 Register has, what they're allowing in there has

1 changed quite a bit since the original, since the
2 current rule was published. And especially with
3 the advent of the use of the Internet, much of
4 this information, their view is it's available
5 elsewhere. Plus, I believe their view is that
6 the reference information can change but the rule
7 isn't necessarily changing.

8 So, in their perspective, there may be
9 some confusion when you look at the actual
10 regulation versus what is the current practice in
11 say a building standard or something like that if
12 that changed. But we did get some comments on
13 this in our meeting in Sacramento in particular.
14 And we may get some here and in our other future
15 meetings, and that's something we'll have to take
16 up with the Federal Register when we sit down to
17 write the final rule.

18 The preamble. Preamble provides
19 background and overview of the history of 170.
20 This is publication in July of 2004. It talks
21 about the law that's been passed as effective,
22 the IRR Program and the Tribal Transportation

1 Program now. Efforts took place to clarify
2 policies and procedures that were established.
3 Consultation session in locations scheduled and
4 agenda for the current consultation schedule, an
5 explanation for the proposed procedures that are
6 contained in each subpart of the, or I'm sorry,
7 proposed revisions that are contained in each
8 subpart of NPRM and other information on the
9 procedure and requirements of publishing an NPRM.

10 So, this is, what you'll see in the
11 NPRM here is going to be, in the preamble of the
12 NPRM here is going to be fairly different than
13 what you'll see in the final rule. In the final
14 rule, the preamble is used as an explanation of
15 a, sort of like question and answer. Like we
16 received comments regarding this issue, and then
17 a response. And if you look at the actual
18 published and current rule, there's a long
19 preamble that discusses the points of differences
20 between the Federal Government and the rulemaking
21 committee and why the final rule has certain
22 provisions in there that may not have been quite

1 what the negotiated rulemaking committee wanted
2 or vice versa.

3 MR. CHRISTIAN: Excuse me.

4 MR. CAULUM: Go ahead. Your name,
5 sir?

6 MR. CHRISTIAN: Tommy Christian,
7 Tribal Executive Board Member of Assiniboine and
8 Sioux Tribes. I'm kind of having a deja vu
9 because I was a part of the land buyback
10 previously as well. It appears, now you can
11 correct me if I'm wrong, but it appears you all
12 are doing the same thing you did with the land
13 buyback as it relates to including the tribes in
14 respect to what is a tribal consultation. And it
15 seems like you're just kind of unilaterally just
16 kind of making these decisions on our behalf and
17 justifying those decisions that you all make for
18 the tribes, and I don't understand that.

19 And it seems like we would learn at
20 some point but I don't know. Any tribal leaders
21 feel that way, too? A deja vu kind of, sort of
22 thing like with the land buyback or kind of the

1 process that's in place? I'm just wondering.
2 I'm thinking out loud and I mean no disrespect to
3 anybody. But there seems to be a pattern that
4 we're choosing to follow. And as a tribal
5 leader, I would just like to understand.

6 Is this an official, what you're
7 calling consultation, or something? Because I
8 don't want to get caught up in that argument with
9 all these different Secretaries of Interior and
10 all that good stuff and whatnot. The trial is
11 now over in that land buyback thing and it
12 appeared that we did address some changes, are we
13 following that same pattern? Or how are we
14 wishing to address this because this really
15 affects us, and especially for the Assiniboine
16 and Sioux Tribes. We've got two million acres
17 of, and I don't know how many miles of roads that
18 we have, but it really affects us in respect to
19 just being Pan-Indianism in this way, excuse the
20 term.

21 But the generalization I think is not
22 fair to our people and I think that's what my

1 good friend John Smith was addressing in respect
2 to, he wasn't being sarcastic, he was just
3 addressing it from a perspective of his tribe.
4 And I have to agree with that. So, what do you
5 say about something like that?

6 MR. CAULUM: Well, our view is that
7 this is in fact official consultation. It's been
8 approved by the Assistant Secretary of Interior,
9 the six dates and locations, following a process
10 that, I think, I'm not sure how the land buyback
11 structure worked in terms of if the Department
12 went out and did a draft and then consulted in a
13 formal NPRM.

14 However, here, I think the roles for,
15 I mean I personally go to each of the meetings of
16 the Tribal Transportation Program Coordinating
17 Committee, and they give us a lot of input, a lot
18 of very valuable input. Each of the members of
19 that committee represents one of each of the BIA
20 regions, and there's also an alternate that
21 attends many of the meetings. When we, after
22 MAP-21 was enacted, we developed a draft

1 regulation. And the preamble of the NPRM
2 addresses many of the things that we looked at
3 when we developed the draft. And then we went to
4 the Tribal Transportation Program Coordinating
5 Committee, sought their input. That we do not
6 view as consultation because it's a committee
7 that's appointed by the Assistant Secretary of
8 Indian Affairs.

9 But their feedback and recommendations
10 are, you know, are extremely valuable to us. We
11 went and then made some more further
12 modifications to that draft which we then made
13 available. And we did consultations at, I
14 believe it was four locations? Three locations.
15 Again, at the approval of the Assistant Secretary
16 on the draft. We received comments on the draft.
17 In response to those comments, we made changes
18 that then ended up in the final NPRM.

19 Because of some of the unique process
20 of doing a draft and having that made available
21 to tribes, that allows us to have control of this
22 process until the NPRM is actually published in

1 the Federal Register. Once the NPRM is
2 published, in a lot of ways the program itself,
3 jointly run between Federal Highway and BIA,
4 loses a great deal of control because now you're
5 in a much more formalized process. The draft
6 process is a more informal process where we're
7 able to I think get really good feedback in
8 particular from the coordinating committee but
9 also people that are really interested in the
10 program and how it affects them.

11 So, our hope is that we have been
12 pretty aggressive about getting comments from
13 tribes across the country through the draft
14 process, and now through the NPRM process.

15 MR. CHRISTIAN: You know, you and John
16 McClannahan must have read the same book. Those
17 guys had already, he said the same thing as
18 you're saying essentially. Excuse my sarcasm, I
19 just would like, you know, we spend a lot of
20 money for the legal approach in the Assiniboine
21 and Sioux Tribes and we have a legal perspective
22 which we like to be considered. Would you all

1 consider that?

2 Well, I was just saying this guy and
3 John McClannahan who heads up the land buyback,
4 they must have read the same book because the
5 response was basically pretty much the same
6 generally speaking. But we have a legal, we
7 spent a lot of money in the legalities and all
8 that good stuff, the legal perspective of
9 Assiniboine and Sioux Tribes. And are you going
10 to consider some of our legal approaches and
11 concerns as it relates to Sonofsky Chambers, and
12 I see Matt sitting over there, don't mention my
13 name, but they are our legal eagles.

14 And so, are you going to consider
15 those perspectives? Because we pay a lot of
16 money for these things and we'd like to get them
17 identified. I do have a concern under this
18 consultation which you just identified and how
19 you went about it.

20 MR. CAULUM: We are obligated to
21 consider any comments that are submitted, both
22 verbal comments here and also any written

1 comments that we receive. The comment period is
2 open until March 20th.

3 MR. CHRISTIAN: Okay. So, get those,
4 Matt, those concerns.

5 MR. CAULUM: Matt, for the record,
6 Matt Jaffe is indicating that, yes, those
7 comments may be submitted.

8 MR. CHRISTIAN: I'm just concerned
9 because I know that Big John has some issues of
10 concern as well in getting his needs met in
11 respect to that. And in reference to tribal
12 consultation, I'm just leery of that in regards
13 to the capacity. And I think we have all the Ho-
14 Chunk Nation here so I think you lose a few
15 battle.

16 MS. LONE TREE-WHITERABBIT: We could
17 have a meeting if we wanted.

18 MR. JAFFE: Good morning. Matt Jaffe
19 with Sonofsky Chambers. As a follow-up to the
20 Councilman's remarks, I think part of what he was
21 getting at was that the original Part 170
22 regulations were the work product of negotiated

1 rulemaking back in 1999, 2000, 2001. It was a
2 government to government relationship between
3 Indian tribes and the Agency's jointly
4 administrated then Indian Reservation Roads
5 Program.

6 You made reference, Andy, to the fact
7 that OMB had certain restrictions on what could
8 be published in revised regulations or new
9 regulations, such as information contained in the
10 Part 170. And I think the point that Councilman
11 Christian and other tribal leaders are making is
12 how well did the Bureau of Indian Affairs and the
13 Federal Highway Administration point out to OMB
14 or the Office of the Secretary that the Part 170
15 regulations that were published in 2004 and took
16 effect in 2005 were the work product of the joint
17 federal-tribal negotiated rulemaking committee.
18 And notwithstanding other federal requirements
19 that a lot of the work product that is still
20 relevant after enactment of MAP-21 should have
21 been retained and that the agencies should have
22 used greater caution into leading consensus

1 regulations, and that that would be more
2 respectful of government-to-government
3 relationship and true consultation than to say
4 OMB said we had to take this out so we took it
5 out.

6 And tribes really haven't been
7 consulted on, not so much what is included,
8 you're doing that today, but what was omitted and
9 what has been deleted from the regulations. And
10 I think that's where tribes have the greatest
11 sense of disappointment into what the NPRM
12 contains.

13 MR. CHRISTIAN: Absolutely, because
14 the new administration that you spoke about in
15 this transition, and that's true because this new
16 administration that you spoke about in this
17 transition of getting this involved, that
18 involved, under that new administration of Obama,
19 he said government-to-government with tribal
20 leaders was the relationship, that's what was
21 going to be pursued. And evidently, based on
22 what's going on here, I don't find that being

1 consistent with that administrative policy that
2 the President of the United States of America
3 established. And I think that's fair to say,
4 right? Would you agree with that, Matt?

5 And so, that's where I'm coming from
6 just generally speaking. I don't want to offend
7 anybody or hurt your feelings or get you fired or
8 anything. But that's just the way that I feel as
9 a tribal leader.

10 MR. CAULUM: Very good. Thank you for
11 comment. And --

12 MS. PHILBIN: Ladies and gentlemen,
13 just as a reminder --

14 MR. CAULUM: Can you identify
15 yourself?

16 MS. PHILBIN: I'm breaking my own rule
17 here. Vivian Philbin, Federal Highway
18 Administration. Ladies and gentlemen, as a
19 reminder, for the benefit of the court reporter,
20 when we read the transcript we'll all remember
21 today who said what. But even if you're
22 speaking, there's a response and then the next

1 time you speak into the microphone or have any
2 comment, please identify yourself for the record.
3 It's very difficult when we're looking at the
4 written pages and addressing all the comments, we
5 want to know who is saying what. Thank you very
6 much.

7 MR. CAULUM: And one thing I don't
8 want to, I don't want in any way to discourage
9 any comments on the issue that you've raised from
10 Assiniboine and also Mr. Jaffe has discussed is,
11 and I alluded to this actually I think a couple
12 of slides back, if there are any of those
13 sections that tribes feel should be put back in,
14 we need to hear that. We are in sort of a, in
15 some ways we're in a catch-22 because obviously
16 OMB works for the President as well and the
17 President runs OMB, the President runs the
18 Federal Register. He also is in charge of the
19 Secretary of the Department of Interior,
20 Secretary of Transportation.

21 So, we're in kind of another role in
22 a way because in the one hand we put together the

1 proposed rule, we put a draft forward, and we
2 heard back from Federal Register and OMB, you
3 can't do that. So, in order to move the rule
4 forward, you know, they work for the President
5 ultimately, right? We do, but they have the
6 power to say we're not publishing your rule even
7 as an NPRM if you have that stuff in there.

8 However, if we hear comments from tribes that
9 this is something that's very important and there
10 is a possibility, and I can't tell you that this
11 will happen, but if the comments come in and say
12 we think this is really important, that helps us,
13 if there is a possibility of putting that
14 information back in, that really helps us to make
15 the argument to OMB and the Federal Register this
16 needs to stay.

17 And so, we do encourage comments on
18 that. And if that's something that is important
19 to the tribes, we really would like to hear it.

20 Moving forward with the preamble, in
21 a broad overview, the NPRM revises and updates
22 Part 170 to comply with legislation regarding the

1 Tribal Transportation Program; reflect changes in
2 the TTP delivery options that are available to
3 travel governments, as I alluded to earlier,
4 you'll see that we added a definition about
5 program agreements in particular, but other
6 aspects as well; make technical corrections to
7 clarify program-related responsibilities and
8 requirements for travel governments between BIA
9 and the Federal Highway Administration; clarify
10 the requirements for proposed roads and access
11 roads that tribes request to be added to or
12 remain in the National Tribal Transportation
13 Facility Inventory, formerly known as the IRR
14 Inventory; remove certain sections of the current
15 rule that were previously included for
16 informational purposes only while directing the
17 reader to BIA and Federal Highway websites where
18 most pertinent information is available.

19 As Bob mentioned earlier, we had
20 consultation sessions already in Sacramento and
21 Phoenix. We're here in Minneapolis on January
22 27th. Thursday of this week, we'll be in

1 Oklahoma City. And then on February 10th, we'll
2 be in Anchorage. And again on February 12th in
3 Seattle.

4 The record for comments will remain
5 open until, I believe it's March 20th. And you
6 can submit your comments via e-mail to
7 consultation@bia.gov. Please make sure to
8 include the reference number so it's properly
9 routed so that they are considered correctly.
10 You can mail them to Ms. Elizabeth Appel who is
11 at the Office of Regulatory Affairs and
12 Collaborative Action, the Assistant Secretary of
13 the Interior -- I'm sorry, Assistant Secretary
14 for Indian Affairs in Washington. You can go
15 through the rulemaking portal at
16 www.regulations.gov. Again, please make sure you
17 refer to the docket ID number, or hand delivery
18 to Ms. Appel.

19 Mail, we don't want to discourage it;
20 however, please understand if you send it via
21 mail, it's going to go through what I call the
22 anthrax. It goes to Iowa and then it comes in a

1 nicely purple or brown format even the paper that
2 you might have submitted it on was white. So,
3 generally the easiest is using the Internet if
4 that's available to you.

5 Any questions? Okay. I'll turn it
6 over to, who's next? Mr. Gishi, I believe.

7 MR. GISHI: Good morning, everybody.
8 Can you hear me? First of all, I want to thank
9 everybody for taking the time to come and be a
10 part of this rollout. Bear with me here.

11 As Bob and Andy had indicated, this is
12 the process that's been in motion, as Matt
13 pointed has been in motion since the negotiated
14 rulemaking first started in 1998 through '99, of
15 course the publication and final rule in 2004.
16 We're going to continue to go off that process.
17 As you look at the format, if you've had a chance
18 to look at the handouts, for information
19 purposes, these handouts are also on the website,
20 the BIA Transportation website. They can be
21 downloaded if you want electronic copies of it
22 also. And the information is in a format which

1 we're going through section by section and
2 identifying what has changed or what the
3 difference is between the current existing
4 regulations, or if there was changes much like we
5 pointed out here where they were taken out, what
6 those sections are.

7 As we get started, the first, Section
8 170.1, the whole section Subpart A talks about
9 policies and the applicability of the program
10 from a TTP perspective and definitions. The
11 biggest changes, as you'll see later on, has been
12 in the definition section and that really
13 reflects changes in the law. Another area that
14 is identified immediately here is you'll notice
15 that in 170 when we first start talking about
16 introducing the application and what does this
17 rule entail, it refers to Department of
18 Transportation, the Secretary of Transportation
19 in particular, to comply with what was passed in
20 SAFETEA-LU that the Secretary of Transportation
21 will now enter into direct agreements with the
22 tribes. And so, anything that is referencing the

1 relationship, coordination and so forth, has to
2 reference and includes references to the
3 agreements that are associated with that, program
4 agreements that were also identified in Title 23
5 under SAFETEA-LU, and again reinforced under MAP-
6 21.

7 It also includes a reference to other
8 appropriate agreements which has been actually in
9 Title 23 since as far back as I can remember in
10 1983 when it first came out, the IRR Program,
11 that's when it was established then. And it was
12 established in reference to other appropriate
13 agreements that was put in there. So, really
14 what it's looking to do is trying to cover all
15 the avenues, availability of all the different
16 type of agreements that tribes can enter into,
17 and that's what this whole Section 170.1 is
18 looking at.

19 170.2 is fairly close in terms what's
20 already in the regulations. But it eliminates
21 the reference to the program, BIA Road
22 Maintenance Program and Interior-appropriated

1 program that's out there. It does not eliminate
2 BIA, the maintenance of BIA roads because we know
3 that's an eligible activity under the TTP
4 Program. So, when we get, this afternoon when we
5 start talking about Section 800 or Subpart G, it
6 will talk about road maintenance and what's
7 eligible under that program as well.

8 Again, reference being the, and this
9 is one of the ones that I just wanted to mention,
10 we did get comments in Sacramento and in Phoenix.
11 And of the comments we did receive in Sacramento
12 was from Sonofsky Chambers, a document that talks
13 about these very aspects that Jim pointed which
14 was what you're asking, that there are many
15 things that were taken out of the regulations
16 that were included in there for information
17 purposes only which would be in the format the
18 Federal Register has had taken out. And one of
19 the things that Jim did was he admonished both
20 federal agencies to do what they could to go back
21 and look at that and see what the possibilities
22 of including that in there, what is the avenue

1 that, what we need to be able to do to include
2 those in there.

3 Again, if they're stronger language
4 for reference or information or whatever, that's
5 what that recommendation is. And I was checking
6 on my little phone, my computer is tied up, to
7 see if it's out there, but I'm pretty sure they
8 posted them. Have you seen them?

9 PARTICIPANT: I'm trying to get to it.

10 MR. GISHI: He's trying to find them
11 but they were, we did receive them and they were,
12 I believe they were going to be posting them last
13 week for the Department. It's a website called
14 www.regulations.gov, so it's an off-Interior
15 site, but it refers to all handouts that are
16 there. There's a reference number that you can
17 put in to look for those. And as soon as we find
18 that out, we'll talk a little bit more about that
19 and give you better information on how to get
20 them.

21 It also updates the contact
22 information. Obviously, the Federal Highway has

1 moved from one building, one part of town to
2 another part of town. Likewise, the Office of
3 Indian Services has done also since we had that
4 last rule. So, those are updated to reflect
5 that.

6 The definitions that are in there, as
7 you can see there's a number of definitions that
8 are primarily a reflection of the changes in the
9 law. The emphasis in transportation as a whole
10 in recent years has been asset management. One
11 for the program has been the discussion about
12 access roads. Access roads, as you recall, was
13 one of the big issues that we talked about in our
14 consultation under Q10, and the pre-MAP-21
15 discussion.

16 I think the last time we were out here
17 we were in Michigan. And the day that we
18 actually were doing presentation on the rollout
19 of the Q10's recommendations regarding access
20 roads, proposed roads, the afternoon before
21 Congress passed what is now MAP-21. So, needless
22 to say, at that point it changed the impact of

1 the formula and how we consider access roads and
2 proposed roads, in fact all roads in general and
3 how the formula changed those. And Bob will talk
4 a little bit about that, how that fits together
5 in terms of what changed from the day before June
6 or July 5th of whenever it was and now.

7 A lot of it refers to the name
8 changes. We're going more of a tribal
9 transportation environment. Excuse me. And
10 program agreements of course is a big part of
11 that.

12 A continuation of that, it does modify
13 some definitions simply because the law has
14 changed. One in particular is, thank you, Tom,
15 the NBI, they got regulations in the works now
16 across the board on the National Bridge Inventory
17 which now includes tunnels. And so, we're not
18 quite sure of what they're doing, if they're
19 going to keep it as NBI or are they going to
20 change it to National Bridge and Tunnel
21 Inventory, because that's how it's stated in the
22 law. We've tried to comply with some of those

1 things in terms of making the eligible. Yes,
2 sir?

3 MR. STEELE: Yes. In your
4 definitions, why don't you have a trust acres
5 defined in there?

6 MR. CAULUM: Sir? I'm sorry, but can
7 you please identify yourself?

8 MR. STEELE: Oh, I'm sorry. My name
9 is John Yellow Bird Steele, President of Oglala
10 Sioux Tribe, Chairman of the Great Plains 16
11 Tribe Region. Sir, I'd like to open Question 10
12 again. When you talking about Part 170, that
13 includes that. Now, in the past, and I'm
14 representing treaty tribes, all 16, the tribes of
15 my area are treaty tribes. And you, sir, are out
16 here representing those treaties of the Long
17 Knives. You had promised in those treaties help,
18 education, social services, economic development.
19 And in 1980, the United States Supreme Court said
20 the most rampant red case in the history of the
21 United States is the illegal taking of the Black
22 Hills. And you sir represent that part.

1 You've been involved in this for quite
2 a number of years. You were involved with
3 Assistant Secretary Neal McCaleb when you changed
4 BIA regulations, Part 170 Question 10 to include
5 state and county roads. Now, my tribe at Pine
6 Ridge and the Great Plains, we did not enjoy all
7 of the monies that the US Government put into
8 transportation. We actually lost some of our
9 historic transportation money because you changed
10 Question 10 to include state and county roads.
11 And I see where tribe -- United States are
12 turning over.

13 In the past, it was on the front page
14 years and years back, \$11 million dollars to
15 state transportation for one area. Now, you
16 don't have trust acreages up here. We are land-
17 based tribes. I had spoken to my face a BIA
18 employee from Aberdeen region that I didn't need
19 east-west roads because my people shopped in
20 Rapid City -- shopped in Nebraska, I needed
21 north-south roads so the people could go shop.

22 What kind of reasoning is that? I

1 can't turn that dollar over even once in my
2 community because of the way you pattern roads.
3 That is why we 638'ed the program because your
4 reasoning was not conducive to any kind of
5 economic development.

6 In my Great Plains area, I have four
7 tribes in the top ten poorest according to the
8 United States Census. Why is this? Because of
9 the BIA and their past operation of roads, the
10 way you pattern the roads. That prevents me from
11 turning that dollar over even once. Now I can't
12 address that. I've got schools coming to me
13 complaining that their school bus dropped. One
14 bus almost tipped over, we can't clear the roads
15 of snow. We can't improve the roads any at all,
16 because of the funding.

17 You look at the inequities. I see
18 proposed roads up here. Roads that will never be
19 built, never, never, never because they're for
20 us. And you're funding them annually. Even
21 state and county roads, tribes count,
22 interstates, going by their 25-30 acres of land.

1 And the cost of improvement of one mile of that
2 interstate is so much greater than asphalt road.
3 In my Great Plains area, it's impossible.

4 Congress tried to address our problem.
5 They recognized what you did, sir, Mr. Long
6 Knife, the inequities and how you're dealing with
7 us. Congress tried to address it in MAP-21.
8 They did to a small degree, but still there is a
9 lot of unfairness. I wish for the BIA to reopen
10 Question 10 to redo that formula to include trust
11 acreages that we are fully responsible for and
12 cannot address.

13 We have the re-authorization of
14 National Transportation Act coming up here and
15 MAP-21, and if you don't address it, sir, I'm
16 going to have to address it to the legislators to
17 see if I can get any more relief out of them.
18 So, I wish you to open that up and allow us some
19 input. I thought that you in the past sneakily
20 did this, did not include us.

21 That is why we're here today to find
22 out exactly what you're doing because we're wary

1 of you, your intentions, that you are going to be
2 pulling something on us again. We don't trust
3 you. So, that's why I asked in the definitions
4 here why don't you have trust acreages in there?
5 How can we get our trust acreages counted? And
6 how can we downplay the state and county roads
7 being counted? You put into such a degree that,
8 to some fairness, it's happened for years and
9 years and years, our roads and bridges are being
10 so deteriorated.

11 We're going to have to go back to
12 using wagons again. How are we going to catch up
13 with the rest of America? You, sir, prevent
14 this, Mr. Long Knife. Thank you.

15 (Applause.)

16 MR. GISHI: Thank you. And I think as
17 we go up through the presentation, there's a lot
18 of explanation in the formula itself. First of
19 all, Congress did pass the law and Congress was
20 responsible for those changes in the formula.
21 The tribes were actually on a pretty good in the
22 direction of rectifying the old Question 10

1 scenario at the time that the law was changed.

2 That's the recommendation, the trust
3 acreages that's in there. I mean the definitions
4 that were coming off of are actually what
5 definitions that are in the law pertain to Title
6 23. So, that's a recommendation and we'll take
7 that into consideration relative to that.

8 As far as the formula is concerned, as
9 you'll see in Subpart C, how it considers all
10 those aspects of what used to be the form formula
11 and what is now the formula that has been
12 actually put into law by Congress and which this
13 regulation is essentially just reiterating those
14 particular provisions that are in the statute
15 itself. As you go down through the definitions,
16 again I mentioned there's a number of these that
17 have been modified to reflect the changes in the
18 law itself. It used to be state transportation
19 partner I think it was, now it's the state
20 transportation agency, that's a direct change out
21 of Title 23 that has been adopted.

22 MR. STEELE: John Yellow Bird Steele

1 again. You did not answer me on why you will not
2 include trust acreages in it. I've got three
3 million acres of reservation. I've got three
4 million acres of reservation and the other land-
5 based reservation provides trust acres, the
6 amount of trust acres that we're responsible for.
7 The state does not want our trust acreages. We
8 cannot access any other monies. Why can't we put
9 that in the definitions?

10 MR. GISHI: Well, that was my point is
11 that's a recommendation that can be considered
12 from you and, if it comes up elsewhere, likewise.
13 And I'm telling you right now, there is no
14 indication in the law that requires that fact or
15 formula used to use trust acreage or acreage, we
16 used to call the land base in the old formula
17 back in 1987 or '89. And that has been replaced
18 by two concurrent formulas since then, and of
19 course this one which is, and those were
20 regulatory formulas, this is now a statutory
21 formula.

22 MR. STEELE: Well, then put land base

1 in there.

2 MR. GISHI: And it doesn't consider,
3 well, that would have to be handled through
4 Congress. That's what statutory means is only
5 Congress can change that law. Not an agency, not
6 an office, Congress only.

7 Removes the following definitions for
8 purposes of obviously the concept of where the
9 program came from under the old IRR. It was very
10 much construction-based. It was referred to as a
11 roads program. Now it's the transportation
12 program. It includes toll roads, it includes
13 ferries, it includes transit systems, it includes
14 all facilities associated with the movement of
15 the public from A to B. And so, the result of
16 that is you have to outline each of those
17 programs that have specific definitions that go
18 with them as you see in the TTP transit program,
19 TTP planning process, and also the TTP in terms
20 of the -- that are described in the law itself.

21 Office of Self Governance is under the
22 Secretary of the Interior. So, it's not

1 referenced in there anymore because it's covered
2 under the Secretary of the Interior.

3 The following definitions have been
4 replaced. The existing 25 CFR is here and the
5 notice of proposed rulemaking is there.

6 Obviously, the most obvious one is the change in
7 the name from the IRR to the TTP, or in this case
8 Tribal Transportation facility road as opposed to
9 a facility because it includes all those other
10 eligible activities, eligible infrastructure,
11 eligible construction and planning processes.

12 As you go down through there, one of
13 the areas that we're starting to see as we
14 mentioned is more in terms of, and I think if you
15 kept up with the re-authorization, the way that
16 the transportation authorization goes is
17 generally based on two major committees in
18 Congress. And lately, it has been viewed as
19 asset management, the concept of looking at all
20 of the systems, prioritizing, and making sure
21 that whatever priorities that are out there are
22 first addressed in a manner of some sort of

1 process procedure that addresses those needs that
2 are out there and takes into account any number
3 of elements that are there.

4 Subpart B, so that's Subpart A, very
5 short, not a lot of differences from what was in
6 the rulemaking aside from the definitions and
7 aside from the changes in references to the
8 Secretary of the Interior. Under consultation,
9 collaboration and coordination, obviously the
10 Subpart B talks about this from the program
11 policy and eligibility standpoint.

12 What are some of those? And it
13 references specifically the purpose of the
14 program in 170.101. And if you go to 23 USC
15 Section 202(a), in the past the eligible
16 activities was listed under the contracting
17 mechanism, under the contract section. Congress
18 changed that and now put the eligible activities
19 clearly right up front at the very beginning of
20 that Section 202. So, when you look at that,
21 it's a very clear definition of what activities
22 are eligible under this process of the program

1 and what's available.

2 Section 102 combined into 101. At
3 this point, we have in the table of contents,
4 you'll notice that there is a Section 102 and
5 103. When you look at the body of the
6 regulation, you'll notice that there is a 103 and
7 a 103. The second one is actually 103 and the
8 first one should be numbered as 102. And you'll
9 note that in there, that's also part of that
10 errata sheet that will be, it has been posted, I
11 think you have a copy of it. But it will also be
12 posted on the website as we find more. We
13 actually found another one at the last meeting in
14 the publication of the Federal Register itself.

15 Section 103 itself clarifies that
16 consultation is required for obligating any TTP
17 funds for direct services, and that's in the
18 category of really what was part of the
19 rulemaking process. So, those tribes who wanted
20 a mechanism to be able to make sure that if BIA
21 was doing the work for them, that they had some
22 process, formal process of back and forth to

1 understand what projects were being completed and
2 what was being undertaken in that capacity.

3 104, 105, no significant changes.

4 Reworded for clarification purposes. And by the
5 way, we have just finished yesterday the side by
6 side which we hope to get posted if not today
7 certainly tomorrow, at the end of the day but
8 certainly tomorrow, on that same website of a
9 side by side which basically shows what's in the
10 25 CFR 170 as it is and what's in the notice of
11 proposed rulemaking, the documents you have in
12 your hands.

13 The side by side is compared by actual
14 sections, so it isn't by topic in terms of, all
15 the topics are there but it references and uses
16 as the base the original or the existing 25 CFR.
17 And so, Section, as I mentioned, say 109, if
18 there was a 109 in NPRM or there isn't in the
19 NPRM and there was one in the old rule, they'll
20 line it up there. In most cases they're the
21 same. In some cases they've changed it because
22 we've moved material from one section to another

1 section. There is, when the final rule comes
2 out, it will show the locations of the sections
3 from the NPRM to the final rule if there's any
4 changes there. But that's something that you'll
5 be aware of as you go through this.

6 We have again another location where
7 it talks about 'shall' and 'will'. Those are
8 used, we've seen, interchangeably over the years.
9 And in this case, it changed there from shall to
10 will.

11 MR. CHRISTIAN: Excuse me? Did you --

12 MR. GISHI: Yes?

13 MR. CHRISTIAN: 109, did you change
14 that from state and local government officials
15 shall work with tribes?

16 MR. CAULUM: Can you, sir, excuse me.
17 We need to make sure because we're, the court
18 reporter --

19 MR. CHRISTIAN: Okay. Tommy
20 Christian, Fort Peck Assiniboine and Sioux
21 Tribes.

22 MR. CAULUM: Thank you.

1 MR. CHRISTIAN: Now, listen to me. It
2 says changes to state and local government
3 officials shall work with tribes, you're changing
4 that to will work with tribes and give them all
5 their carryover. Right? Why didn't you --

6 PARTICIPANT: That, we're appreciative
7 of that.

8 MR. GISHI: Thank you. And Section
9 110, no significant changes. And we've got a
10 comment back here?

11 MS. LONE TREE-WHITERABBIT: Good
12 morning again. I am Representative Kathleen Lone
13 Tree-Whiterabbit. Lone Tree is two words and
14 there is a space, hyphen Whiterabbit.

15 My comment on 170.109 is the change
16 from state and local government officials shall
17 work with tribes, and a proposal to change to
18 will work with tribes, what is the legal
19 ramifications of that? I was always told when I
20 was a young legislator years ago that shall means
21 they legally have to meet with us and discuss
22 with us and consult with us. Might means they

1 can do it if they want to, or will meet with us
2 if we want to or they don't have to. So, I
3 thought shall was legal interpretation that
4 should remain in here.

5 Is there a legal response?

6 PARTICIPANT: There's no might.

7 MR. CAULUM: Andrew Caulum --

8 MR. GISHI: Please state your name.

9 MR. CAULUM: Andrew Caulum, Solicitors
10 Office, Division of Indian Affairs. Yes,
11 generally speaking, the legal view is that shall
12 is mandatory, may is discretionary. Will is
13 maybe somewhere in between, but shall generally
14 is viewed as mandatory language.

15 MR. FERRIS: That's a lot of change.

16 MR. GISHI: Again, that was?

17 MR. FERRIS: Kade Ferris from Red
18 Lake. The question is then why make the change
19 from shall to will? What would be the thought
20 process behind that? Because you're trying to
21 get it out as a major point right here, so
22 obviously it is a major point. So, I think that

1 Ms. Whiterabbit made a great observation.

2 MR. GISHI: Thank you. And that's,
3 those are the comments we need to hear simply
4 because it does, as Andy indicated, it carries
5 more weight and that's what I've always
6 understood also. And that's why I said we jump
7 around, when I say we, people who have reviewed
8 these and have oversight, shall, will, must,
9 there is also a must in there, and may is kind of
10 way out there. And that I think in this case is,
11 and it does, there are 'mays' in the law and
12 usually if they do we follow up with them in the
13 regs also in terms of what's identified.

14 MS. LONE TREE-WHITERABBIT: Closing
15 comments on that. My only, again Representative
16 Kathleen Lone Tree-Whiterabbit, Ho-Chunk Nation.
17 My only concern with that is, historically, you
18 know, the gentleman in the first row had stated
19 before that he didn't trust the Long Knives.
20 Neither do we. And in our treaties,
21 historically, they've always said, oh, this is in
22 your best interest, and then we went through

1 several removals in our Ho-Chunk history.

2 So, I would prefer that the change not
3 take place to the Section 170.109, and that the
4 wording remain the same, state and local
5 government officials shall work with the tribes,
6 and that will work with tribes not be considered
7 and not be changed to that wording.

8 MR. GISHI: Thank you.

9 MR. ROUSSEAU: Richard Rousseau,
10 Cheyenne River Sioux Tribe. Also council
11 representative. We went to the state of South
12 Dakota, we went there and we had a meeting down
13 there. They wanted our data on Highway 212. You
14 know, they come in and redesign our road and it
15 became a cluster. You know, we asked for traffic
16 signs, we asked for cameras, different things.
17 Six months went by. You know, we could talk all
18 we want but they're not going to do it. We need
19 that power in there.

20 How many people do we have to kill on
21 the roads before you guys pay attention to us?
22 BIA Road Route 2, or excuse me, 12, Cherry Creek,

1 12 miles, you know, we should have our safety
2 covers on today, that is a nightmare. But yet
3 it's going to take \$1.3 million a mile. You
4 know, we're going to have to go to Congress and
5 fight. We shouldn't have to go to that level.
6 We got a lot of BIA that should be out there
7 doing it for us. But in my opinion, they failed,
8 you know.

9 A lot of stepping up, you got some
10 very good comments. It's easier to make some
11 comments in the back and the let the voices come
12 up. They've been here a lot longer than I have,
13 you know, a little over two years, but they're
14 not responsible.

15 You take the counties, they're not
16 going to share the funding, you know. They're
17 needed, too. You guys come in with some payment
18 money and spend it up in a little town called,
19 but they got almost -- in a short time to -- you
20 know. Money is gone, there is never enough
21 there. We take over the little stuff, price of
22 fuel, the expenses we got behind it, you know.

1 They expect us to put a million-dollar
2 road together with a million dollars nine miles a
3 road, ten miles. They don't work that way. You
4 know, if your -- is up here, your TIGER grant, we
5 tried. They went elsewhere to more needy roads.
6 We don't have a lot of the things that I've seen.

7 The wording I guess is, I think we had
8 41 pages in ours. Wow, the paperwork is unreal.
9 So, something needs to be done and a lot of
10 answers.

11 MR. GISHI: Thank you. Before we go
12 on, do you want to address that?

13 MR. CAULUM: Andy Caulum, Solicitors
14 Office, Division of Indian Affairs. I just want
15 a maybe quick comment. That language that is in
16 there, will versus shall, we will definitely be
17 looking at that, obviously looking at all the
18 comments made concerning all of them. The
19 sections of 23 USC, or 23 USC 134 and 135, they
20 are referenced in the beginning of that
21 discussion, and that is something we'll
22 definitely look at because it does appear that

1 there might be a difference in the language
2 there.

3 MR. GISHI: Thank you.

4 MR. FISHER: Conrad Fisher, Northern
5 Cheyenne Tribe, also on the Tribal Council. I
6 noticed that on the Register there is will under
7 already, and then here we want to try to change
8 it from shall back to will. So, it gets really
9 confusing. I don't know if that's the
10 inconsistency of the Bureau itself or why that
11 might be the case. But it seems very confusing,
12 and the more we discuss it the more confusing it
13 becomes.

14 Why not have both words in there? Why
15 can't both shall and will be in there as a
16 recommendation? So, it would read, "State and
17 local government officials shall and will work
18 with tribes." Why can't both words be part of
19 that language? I think that's something to
20 consider, just based on the history of
21 alternating those terms in the past. Thank you.

22 MR. GISHI: Thank you. Section 111 in

1 170 includes reference to, I guess I mentioned it
2 before, eligible activities in the use of the TTP
3 program funds, reference to Appendix 8 to the
4 subpart with a more detailed listing. And that
5 was one of the ones that stayed in the
6 regulations, Bob had indicated there was a number
7 of them. In one of your handouts, that's in
8 there, and it's also posted on the website, it
9 shows the applicable appendices that are
10 referenced in the regulation. They are posted on
11 two websites, FHWA as well as BIA. And this is
12 one of the ones that stayed in the rule itself
13 simply because it references specifically
14 eligible activities that need to be required and
15 covered under the regulation.

16 112 makes references to maintenance
17 activities on the list of ineligible activities.
18 In 2004 when this came out, maintenance was still
19 an ineligible activity. In 2005 under SAFETEA-
20 LU, it was mentioned and road maintenance became
21 an eligible activity. MAP-21 enhanced that to
22 not only 0.25 percent but also to allow for up to

1 \$500,000 whichever was greater. It also
2 clarifies that the purchase of construction and
3 maintenance equipment in terms of the equipment
4 itself is eligible and must be approved through
5 the process of whoever the contracting agency is,
6 BIA or FHWA.

7 In the old rule itself, it only
8 allowed for a purchase of equipment associated
9 with the design engineering aspects, the total
10 stations, the GPS equipment, that type of
11 information and equipment that was there. And of
12 course at that time, in the regulations and the
13 law, that was one of the areas that we revised.
14 That was not an eligible activity, now it is.
15 We've had purchases all through the IRR process
16 and obviously since then we're working through
17 the process of including those in the regulations
18 also.

19 MS. DAMERON: Question. Teresa
20 Dameron. Tribes are interpreting that to mean
21 that they have to get both approval just so
22 you're aware. And that's not the case, correct?

1 They don't have to get both Federal Highway and
2 BIA? If they go through BIA, they get BIA
3 approval; if they're direct Federal Highway, they
4 go through Federal Highway?

5 MR. GISHI: And if you include those
6 on the TTP, I know there's recent discussion on
7 the planning process and this question came up in
8 Phoenix, there's different aspects of how that
9 would apply. And if it's included in the TTP,
10 generally that TTP is not approved until it goes
11 through the process through tribe BIA and through
12 Federal Highway.

13 So, from that standpoint, that pretty
14 much covers it, you know, from that perspective,
15 which also, and the TTP is independent of whoever
16 is contracting the work. Because we're seeing
17 some tribes that prefer to, instead of go through
18 the construction portion or the main program out
19 of Office of Self Governance but may choose to do
20 the planning or portions of other programs under
21 the BIA until Subpart J. So, what the TTP does
22 is it allows the process to be approved

1 regardless of the funding, or excuse me, the
2 agreement mechanism that's there. But generally,
3 what you're saying is whoever is administering
4 the contract would be the one answering the
5 questions, and that's where the request would go
6 to because that's where the relationship is
7 between the tribe and the agency.

8 MS. DAMERON: Teresa Dameron again.
9 So, is that verbiage, can that verbiage be made
10 more clear?

11 MR. GISHI: We'll make it clearer, and
12 that's a good point. We'll make sure it
13 identifies, that under the process, that it can
14 be included on the TIP. I think we have had some
15 comments, I'm pretty sure, from Phoenix on that
16 also.

17 MS. DAMERON: Okay.

18 PARTICIPANT: And it "shall" be.

19 MR. GARRIGAN: Jim Garrigan,
20 Transportation Consultant. Doesn't that change
21 conflict with 25 CFR 900 and 1000?

22 MR. GISHI: In terms of?

1 MR. GARRIGAN: Public Law 93-638 where
2 tribes can purchase that equipment without that
3 approval.

4 MR. GISHI: The 900 and 1000 in terms
5 of the agreement mechanism or the funding
6 mechanism?

7 MR. GARRIGAN: In either, either or.

8 MR. GISHI: Yes, well, in this case,
9 that's why -- we've had a lot of discussion on
10 this is the advantage of going through the
11 funding mechanism, in this case the TTP program,
12 is it allows you to cover for all programs
13 regardless of the type of agreement they have.
14 And so, if it does, it reinforces that concept in
15 terms of 638 agreements, self governance, Subpart
16 J. And those are activities but, like I say,
17 they weren't eligible prior to this. In the
18 regulations.

19 MR. GARRIGAN: Okay. They were
20 negotiated though in the agreements, weren't
21 they?

22 MR. GISHI: But they were negotiated

1 individually, and it became an acceptable process
2 well before getting bridge work put out there
3 back before R, and in fact R was a big time when
4 we actually had a process that was put in place
5 to be able to, because all of the recipients
6 wanted to purchase equipment to do maintenance or
7 whatever.

8 MR. GARRIGAN: So, what was -- 900 and
9 1000?

10 PARTICIPANT: Yes.

11 MR. GISHI: No, I think it confirms
12 it. It continues to confirm it for the use of
13 the funds under TTP. This 900 and 1000 applies
14 as a general rule to the funds that are provided
15 through these agreements which may apply to
16 taking advantage of those areas of construction.
17 But it's not intended to do that, so it certainly
18 is intended to not only be consistent with all
19 the support to that process. Yes, please?

20 MR. SMITH: John Smith, Shoshone and
21 Arapaho Tribes. But it doesn't, certainly the
22 leasing doesn't have to be approved by the BIA or

1 Federal Highway, right?

2 MR. GISHI: Right. And we'll get to
3 that, we'll bring that up because that's another
4 option as part of the process is to consider the
5 availability of leasing also which has always
6 been an eligible activity. Yes?

7 MR. JAFFE: Matt Jaffe, Sonofsky
8 Chambers. I guess as a follow-up to Mr.
9 Garrigan's remarks, if I'm not mistaken, under at
10 least the Federal Highway agreement, program
11 agreements with tribes, it isn't their approval
12 of the lease or purchase of equipment. It is
13 that tribes have to do a cost benefit analysis to
14 show that lease or purchase is more cost
15 effective to the tribe and that they're simply
16 acknowledging the tribe's due diligence in making
17 that determination. So, perhaps the reference to
18 approval by BIA and FHWA needs to be
19 reconsidered. And I think that's the current
20 practice of the agency.

21 MR. GISHI: Right. In the current
22 practice of the agency, it does, when you get to

1 that part, it does talk about lease purchase
2 versus with the purchase. And for the purposes
3 of what we're looking at, that's one of the
4 options. But ideally, what we're trying to put
5 on here in the summary is that the purchase of
6 equipment is eligible outright and that was one
7 of the areas that we had an interpretation from A
8 to Z that it was and it wasn't in the past ten
9 years or so.

10 MR. JAFFE: I also had one additional
11 comment with regard to 170.111, the eligible uses
12 of TTP funds. It is true that the regulations
13 make reference to MAP-21, but it seems to omit
14 the fact that there are catchall phrases in
15 Section 202(a) of MAP-21, and I'll explain those
16 in a moment. So, the purpose of any regulations
17 are to elaborate and expand upon statutory law as
18 long as those interpretations and expansions are
19 consistent with the law, the regulation is lawful
20 and valid. And what we're seeing in 170.111 is
21 that perhaps inadvertently the agencies are
22 narrowing and constraining these eligible

1 activities.

2 In MAP-21, in Section 202(a), it talks
3 about other appropriate public roads and
4 facilities as determined by the Secretary. The
5 regulations talk about appendix to the Subpart B
6 that talk about recommendations by the
7 coordinating committee or an Indian tribe. But
8 there is also this large catchall phrase that an
9 eligible use of TTP funds includes any
10 transportation project eligible for assistance
11 under this title that is located within or
12 provides access to tribal land or is associated
13 with the tribal government. But Part 170 revised
14 regulations don't reference that catchall phrase,
15 it says as authorized under this part, Part 170.

16 So, I would encourage the agencies to
17 go back and look at MAP-21, Section 202(a)(1)(c)
18 which seems to be a much larger catchall phrase.

19 MR. GISHI: Thank you. Thank you, and
20 that was again the intent of the rulemaking
21 process, to include all of Chapter 1.

22 MR. STEELE: Yes, John Yellow Bird

1 Steele, Oglala Sioux Tribe, Great Plains. Now,
2 this issue of, you've got to be more careful
3 here. I ran into this with other departments of
4 the BIA where your methods of micro-managing and
5 your verbiage that was put that construction or
6 maintenance equipment must be approved, you've
7 got to make reference back to self determination
8 638 where it gives tribal contractors authorities
9 that the BIA is not in the micro-managing
10 business anymore. And so your verbiage I think
11 is contrary to 638 and that your solicitor should
12 correct this.

13 MR. GISHI: Thank you. Any other
14 comments on that?

15 New use of funds, again if there are,
16 if something is not referenced there but is
17 eligible under new use, there's a process
18 identified there including any updates that may
19 come as a result of changes in the law itself.
20 The idea is a catchall mechanism to allow for new
21 uses to be submitted to either Federal Highway or
22 the BIA, again depending on the circumstances

1 that I've outlined in the regulations where those
2 can be approved. And that basically is a
3 carryover from the old regulation.

4 Cultural access roads, the use of the
5 TTP program funds and cultural access roads, TTP
6 roads, excuse me, states all facilities in the
7 National Tribal Transportation Facility Inventory
8 must be open and available for public use as
9 identified in Title 23. It also describes how
10 roads that are public roads can be closed, either
11 temporarily or permanently, again identifying
12 that circumstances out there sometimes support
13 that process. And this is intended to identify
14 what those area. The National Tribal
15 Transportation Facility Inventory is also
16 specifically stated in the law itself in Title
17 23.

18 In 170.115 and 116, there are no
19 significant changes there.

20 Seasonal transportation and routes.
21 Again, an element that has become much bigger in
22 the last ten years is the inclusion of other

1 transportation facilities in the process of being
2 eligible under this program. What this does is
3 this allows the, it continues to look at those
4 from the standpoint of those eligible activities.
5 Again, we're talking a lot more transit, a lot
6 more unique transportation facilities that do
7 exist specifically in certain portions of the
8 country and with certain tribes, that all designs
9 that are associated with that have to meet some
10 sort of standard. When I say standard, either
11 standards used by the local government, the state
12 or the federal standard. And it combines 123 and
13 124 into 117 under the NPRM.

14 The tribal transportation house and
15 access roads, there are no significant changes
16 there. The total ferry and airport facilities,
17 we just updated that. The Federal Highway
18 agreements were added as referencing the type of
19 agreements that are eligible for the use of funds
20 for the construction addressing these types of
21 facilities.

22 121, no significant changes.

1 122 clarifies how TTP funds can be
2 used for airport access roads and maintaining
3 airport facilities that support, that basically
4 support the public in utilizing those airports.

5 As you get there, 123, the new 123,
6 124, 125 and 126, that's tourism trails, it
7 updates the funding sources that are available
8 and addresses rural transportation facilities and
9 activities. It clarifies how these funds can be
10 obtained. There's no significant changes in 125.
11 And 126 clarifies and of course reiterates what's
12 in another regulation, and that is that roads
13 cannot be built in certain designated roadless
14 and wild areas in terms of those locations. Yes?

15 MR. McKNIGHT: Sean McKnight,
16 Transportation Consultant. On 170.126, in Alaska
17 we've got the Native Lands Reconciliation Act.
18 But in Alaska, you can't build roads in -- get
19 that for you because Alaska is uniquely different
20 on wilderness areas.

21 MR. GISHI: That's a good point. The
22 only one location I think they identify is in

1 Wyoming, and we haven't seen anything in there.
2 So, that's probably why their roads are being
3 built in those areas. I don't think, they
4 probably have the same designation as what's
5 actually in that regulation.

6 MR. MCKNIGHT: I'll look that up,
7 okay.

8 MR. GISHI: Yes. Highway safety
9 functions. Again, highway safety is a big issue
10 that came up as a result of -- oh, I'm sorry, we
11 have a comment here?

12 MR. ROUSSEAU: I know there's probably
13 a time limit. But back up to 115, would you?
14 Fire trails, emergency to back up.

15 MR. CAULUM: Would you please identify
16 yourself for the record?

17 MR. ROUSSEAU: Richard Rousseau,
18 Cheyenne River Sioux Tribe. You know,
19 particularly 114, you know, why isn't there fire
20 trails up there? You know, the BIA has come out
21 and made fire trails for us, a lot of crossing
22 the creeks, the main creek that we have to cross.

1 And yet when we have to use them on our
2 inventory, it wasn't allowed. I don't know how
3 many other, you know, fire trails are allowed but
4 they should be out there, too.

5 We lost a lot of roads because of
6 that. You know, we couldn't, our money was
7 directed somewhere else, but the fire department,
8 you don't see them laying their trails and making
9 them use the access for fire trucks. The amount
10 of -- we had this year is unreal, is like
11 everything else, you know, it comes and goes.

12 If we'd have had a fire, it would have
13 still gone on national news. That's how bad it
14 got up there. And yet when we added it to our
15 inventory, they got kicked back and we only got
16 to use our cultural roads. So, somewhere along
17 the way that means they'll come back up. You
18 know, we tried to put these out there and I'm
19 sure the project manager can jump in on that, how
20 we tried to fight for our inventory. And our
21 roads got back pretty much nothing, you know. We
22 had a lot of what else you got.

1 From my house to BIA Route 8, nine
2 miles cross country, 23 miles all the way around.
3 When the fire truck shows up -- way to get there,
4 you know, from my house to Route 2, 16 miles,
5 almost 19 miles. We did cross country, somebody
6 threw a cigarette out, that's many years ago. We
7 had one for southern farmers and ranchers putting
8 some of these cattle crossings in for the herd or
9 we'd have never made it there.

10 We stopped a lot of fires on these
11 back roads, and yet we're not allowed to get
12 money for them. It needs to be addressed.

13 MR. GISHI: An inventory question,
14 thank you. Highway safety. As was mentioned
15 before, safety is an issue that's come up. It's
16 been a priority of certainly Federal Highways and
17 the Secretary of the Interior as well as the
18 Secretary of Transportation. And we also have
19 new programs established under MAP-21 called the
20 Tribal Transportation Program Safety Funding.

21 There are, most of you or some of you
22 have applied for those. There is approximately

1 two percent of the funds are made available for
2 that. And those are available for safety
3 activities that are associated with the 4 E's.
4 Again, when you're talking about a transportation
5 program, this aspect of it expands. The
6 transportation program is starting now looking
7 ahead with engineering, emergency response,
8 education, and enforcement.

9 And a number of tribes have been
10 asking to work in this program for the last two
11 years and we'll be including it in the program
12 this year also. It is an application process.
13 You'll notice the funding availability is put out
14 there each year and with time lines, and that is
15 handled directly through the Office of the
16 Secretary of Transportation.

17 And basically, 127 through 130
18 describe the types of eligibility, types of
19 activities and how to go through the process.

20 Yes, we have a question?

21 MR. JAFFE: Matt Jaffe with Sonofsky
22 Chambers. We were, as you know, our Tribal

1 Transportation Coalition has been working with
2 you and Bob, Vivian and Andy for years to
3 encourage an interpretation of current law to
4 allow federally-appropriated but state-
5 administered safety program funds being awarded
6 to tribes directly through the TTP award
7 instruments. And I know these regulations have
8 been percolating within the two agencies for a
9 while. And we would encourage the agencies to
10 reflect in the final rule for 170 this
11 breakthrough that the MAP-21 can be interpreted
12 to allow state-administered highway safety
13 program funds to be transferred through the
14 agencies, through BIA or Federal Highway directly
15 to tribes.

16 What this overcomes is that for many
17 tribes, they can't accept state highway safety
18 program funds despite the great need because the
19 award instrument is not a government-to-
20 government instrument. In fact, it requires
21 waiver of sovereign immunity or subjecting the
22 tribes to state courts or different procurement

1 requirements. So, this is an important
2 breakthrough that should be reflected in the
3 final rule. Thank you.

4 MR. GISHI: Thank you, Matt. And as
5 we get through the next subparts, we'll bring
6 that up. It's very good, it's part of the MAP-21
7 and it's verified here. I think Andy will be
8 talking about that later. Thank you.

9 Transit facilities. Transit
10 facilities again is an eligible activity that has
11 been there since TEA-21. And it needed to be
12 there and portions of the transit program that is
13 also managed through FTA. What was referred to
14 as the Public Transportation of Indian
15 Reservations Program is the MAP program. And 132
16 again references that in terms of coordination
17 and that program along with the program that's
18 available under the TTP program.

19 133 identifies that TTP funds can be
20 used to satisfy the local match. That's an area
21 that has been in the works significantly early on
22 in the passage of ISTEA back in 1991 and

1 continuous to be, with Vivian's help, Vivian
2 working over at Federal Highways has been a
3 tremendous help in getting that taken care of in
4 a lot of areas and was probably one of the first
5 steps that's needed to address the transfer of
6 funds through state agencies, local agencies back
7 to each of the tribes. When a local match is
8 required, that local match can be, in fact
9 federal funds can come through the TTP program.
10 Yes?

11 MR. STEELE: Yes, sir. John Yellow
12 Bird Steele again from Oglala Sioux Tribe, Great
13 Plains. Throughout here, you're changing the
14 regulations to reflect a change from the Indian
15 Reservation Road Program to Tribal Transportation
16 Program. What's wrong with Indian Reservation
17 Roads? This defines originally why the funds
18 were appropriated, for Indian reservation roads.

19 I go back to my first question of you
20 sneakily putting state and county roads into that
21 parking lot. This program with the name change
22 is going to be addressing state and country roads

1 with monies appropriated for Indian programs
2 through the BIA. Why change the name? What's
3 wrong with the Indian Reservation Roads Program?

4 MR. GISHI: The change came, again, as
5 a result of Congress themselves. They changed it
6 from the Indian Reservation Roads Program to the
7 Tribal Transportation Road Program. Again,
8 looking at the changes that have been taking
9 place in the program, that it's just not a
10 roadway program, it's actually a transportation
11 program that deals with a lot more in the area of
12 surface transportation. You've got docks that
13 are included in there. We have transit
14 facilities that are included in there, all of
15 these that are there.

16 But primarily, to answer your
17 question, that's the way Congress changed it.
18 And there is no reference to, in fact all the
19 definitions associated with it that's in our
20 Title 23 have been changed also to fit Tribal
21 Transportation as opposed to Indian Reservation
22 Roads.

1 Number 134, this is something again
2 that we're catching up with the process. It has
3 been something that we have been working with
4 tribes. Those tribes that have had transit
5 authorities know that, and we've had questions
6 come forward and say can we utilize these funds
7 for purposes of operational costs. It wasn't
8 written in the regulations and the concern was if
9 it's not there, then it probably should be there.
10 This does not include it because it's consistent
11 with again the program as it's been implemented
12 and as we've gone through and looked at those new
13 uses under the old regulation.

14 The TTPCC -- you had a question back
15 here?

16 MR. BRONCHO: Yes, Anthony Broncho
17 with the Shoshone-Bannock Tribe. On that, back
18 on that last clause there for the transit there,
19 you know, when we started this, you know, I kind
20 of took a gamble on this but, you know, many, a
21 lot of the other tribes, you know, when we have
22 things come out, our tribe is kind of hesitant in

1 getting these things, but right now when it comes
2 down to the transit part, you know, the way I
3 kind of look at it is the program is kind of
4 setting us up for failure. It gives us funds and
5 says that, you know, the funds will be there
6 every year, but right now the way we're looking
7 at it, right now it's not going to happen.

8 You know, we don't live in a big
9 metropolis area. You know, we're rural so that,
10 you know, we travel different parts of our
11 reservation, you know, it's hard for that funding
12 to, you know, get to that stuff the way it is
13 right now. And so, what we're looking at right
14 now coming April, I don't know where it's going
15 to be at. We might be out of the --

16 So, I mean a lot of the people that it
17 does serve, I know that out there some of the CHR
18 programs, you know, we really help them out a bit
19 as well as the community. But then not having
20 those funds there, you know, I don't know what I
21 can do. I can only use so much of my funds out
22 of the Federal Highway to be able to do that,

1 because I got other things that I need to deal
2 with though for the road part. You know, but
3 it's kind of, to me we're just, you know, we're
4 just set up for failure is what it is.

5 You know, we spend a lot of money in
6 picking up the facilities and stuff and I mean
7 everybody was thankful for that. But then here
8 it comes now, we're funding you people. So, I
9 say that and I thank you.

10 MR. GISHI: Thank you. Thank you, I
11 appreciate that comment. The Tribal
12 Transportation Coordinating Committee, most of
13 you are familiar with that. This is established
14 through the rulemaking committee as a committee
15 that basically was going to look at the
16 implementation of the program as it went along.
17 As was mentioned, some of the questions came up,
18 the elements of the program that are in the
19 regulation under the proposed rule came from the
20 coordinating committee.

21 Over the past, since 2006, the
22 coordinating committee has been meeting,

1 addressing issues, specifically those issues that
2 come up in between the time a regulation is
3 published. One of those significant areas was
4 what we were talking about earlier about proposed
5 roads and access roads. And there's another time
6 when we talked about the inventory update
7 process. All of those are areas that came
8 through the Tribal Transportation Coordinating
9 Committee.

10 This basically outlines the definition
11 of how that is currently in the regulation. The
12 major change here is that in the existing rule,
13 there's 12 representatives that are primary and
14 12 representatives that are alternate. And the
15 rule proposes to change that to 24 members on the
16 committee, two from each region are all going to
17 be addressed and considered the same.

18 In other words, they have the
19 authority to vote, they have the authority to
20 comment and take positions in leadership
21 capacities. And so, that primarily is, it
22 eliminates the reference to an alternate member

1 simply because one of the first things that
2 coordinating committee did when they started was,
3 through the budget was indicate that we want to
4 include the alternate committee members in every
5 meeting and that unless circumstances required it
6 they should be there. And since 2006, the
7 alternates have been at every meeting and
8 participated, provided comments, so it's
9 consistent with how they've been operating over
10 the past ten years.

11 The election terms has been updated,
12 primarily identified what the initial procedures
13 were to more of a consistent, continuous process
14 of requesting for nominations and then the
15 appointment process. It's all still the same.
16 It's just we don't have to worry about getting
17 started again, it's already started. So, the
18 startup process has been taken out of the
19 regulations in terms of an election.

20 It identifies the committee members
21 are responsible for disseminating information.
22 That's one of the areas that we've received a lot

1 of comments over the past ten years has been that
2 we'd always get the information out from the
3 committee to the people that are being
4 represented. And this will put it into
5 regulation as to how the process is going to
6 work.

7 And one of the areas also is making
8 sure, because of the infrequency of the continued
9 resolutions and amount of fundings available,
10 getting approval up front beginning of the year
11 of the meetings, tentatively at least from the
12 Assistant Secretary and Secretary actually of the
13 Interior so that they have a meeting schedule on
14 a process that allows them to be able to plan
15 better during the year is included in that.

16 The TTACs better known as the Tribal
17 Transportation Technical Assistance Program
18 Centers are referenced actually in the law as
19 Tribal Technical Assistance Centers. This
20 basically is identified here and also identifies
21 where additional information can be found.
22 Previous to this, this is one of those sections

1 that was referred to as for information purposes
2 only, and we were able to keep the reference to
3 it and it will direct you toward a place where
4 the information could be collected and noted.
5 And that's pretty much just the one section now
6 at 138.

7 Appendix A to Subpart B, this list has
8 a lot of statutory references in hit previously.
9 It has all been updated. And in some cases,
10 those statutes no longer exist, and so they have
11 been either removed or updated to the new
12 applicable statutory citations, limited duplicate
13 entries. And this is one of the areas where we
14 talk about added purchasing, leasing and renting
15 equipment is eligible. In the actual list
16 itself, the equipment purchase must be
17 accompanied by a cost analysis and that's kind of
18 consistent with what we were saying in there.
19 And so, when I mentioned you can catch that
20 later, this is where it's noted in there. And
21 that list of course is referenced in the rule
22 itself and not referred somewhere else.

1 Are there any questions on Subpart A
2 or Subpart B?

3 (No response.)

4 MR. GISHI: With that, I'll turn the
5 time over to, we'll take a break. What time is
6 it right now? 11:00 o'clock? So, we want to
7 come back at 11:15 or thereabouts. Thank you.

8 (Off the record.)

9 MR. SPARROW: What I want to talk
10 about next is Subpart C which is the TTP funding.
11 This part of the regulation, probably more than
12 any other part, saw substantial changes as a
13 result of MAP-21. Generally, under MAP-21,
14 Congress replaced the funding formula that was
15 established through the negotiated rulemaking and
16 contained in Subpart, this particular subpart of
17 the final rule, replaced it with a new statutory
18 funding formula. As a result, all references,
19 calculation formulas, tables, cost tables,
20 references to cost to construct and incidentals
21 and everything else that were associated with the
22 old funding formula including the population

1 adjustment factor, the relative need distribution
2 formula, the cost tables and others have been
3 removed from the NPRM and replaced with the
4 statutory language and the statutory formula.

5 So, Q-10, cost tables, miles, county
6 miles, you know, all the stuff that occurred that
7 was part of the old funding formula no longer is
8 part of the Tribal Transportation Program. So,
9 because of that, that whole, anything that was in
10 this subpart that referenced the cost tables and
11 the various aspects of the old funding formula
12 that are no longer used, they've been removed.

13 Now, Congress, through the statutory
14 formula, basically is telling Federal Highway and
15 the Bureau of Indian Affairs how every penny of
16 the \$450 million that's authorized is to be
17 distributed, what set-aside is to go for, what
18 the new funding formula is and I'll talk about
19 that in a minute, and how the whole thing is
20 supposed to be transitioned over a four-year
21 period. So, everything was outlined in MAP-21
22 for the funding formula. So, again, because of

1 that, you'll see a lot of differences between
2 what's in there now and what was there
3 previously.

4 So, Subpart 170.200 describes how the
5 TTP funding is determined and the old TTAM chart
6 that was in there previously has been removed.
7 This part talks about the set-asides and the
8 transition. And if you happen to have it in
9 front of you, you'll see that the annual TTP
10 funding amount available for distribution is
11 determined as follows.

12 It talks about the set-asides, it
13 talks about the planning set-aside, the bridge
14 set-aside. It brought the bridges back in, it
15 used to be a standalone program, now it's back.
16 It's a set-aside like it was under TEA-21. It
17 talks about the new safety program and the safety
18 funding. It talks about administrative expenses
19 which is the PM&O funds that BIA and Federal
20 Highway use to administer the program, and the
21 travel supplemental funding set-aside. So, it
22 describes and references what part of 23 USC 202

1 talks about each one of these set-asides.

2 And then, it talks about how, although
3 MAP-21 was really only a two-year highway bill
4 and it's been extended through May 31st of this
5 year, so it's kind of working on its third year,
6 and we remember that SAFETEA-LU was extended nine
7 different times, but there's a four-year
8 transition period going from the old formula to
9 the new formula. So, in 170.200, it also talks
10 about each year how the transition into the new
11 formula will take place. Again, this is directed
12 to us by Congress. And this one particular
13 section is pretty much verbatim, cut-and-pasted
14 out of the United States Code which was part of,
15 which was developed as a result of MAP-21.

16 170.201 now contains the funding
17 distribution formula. And it talks about the
18 formula itself and what factors are included in
19 that formula. So, if you look at 201, it has the
20 three different factors of the new formula, 27
21 percent and ratio of the total eligible road
22 mileage for each tribe. It talks about in

1 another section, well, it talks about right after
2 that what is the eligible road mileage.

3 For BIA and tribal roads, it's what
4 was in the inventory in fiscal year 2012. It
5 doesn't change every year. It's locked into
6 whatever the inventory said with BIA and tribal
7 roads in 2012. In addition to that, the other
8 eligible mileage for anything that's not BIA or
9 tribal were those miles primarily in Oklahoma and
10 Alaska that were part of the inventory in 2005,
11 part of that -- 2005 inventory.

12 So, as you all know, being familiar
13 with the program, there was a huge increase in
14 the amount of miles that went into the formula as
15 a result of this regulation in 2005, 2006, 2007,
16 2008, 2009 each year. None of those non-BIA,
17 non-tribal roads that were added in 2005, they no
18 longer generate funding for the tribe. Can
19 funding be used on them? Yes, it can. Those
20 roads are in the inventory. But when it comes to
21 looking at the funding formula, the only eligible
22 roads that generate funding that use part of that

1 27 percent are BIA and tribal roads from 2012 and
2 non-BIA, non-tribal roads from 2005.

3 The second factor is 29 percent and
4 the ratio of the total population at each tribe
5 compared to the total population. So, it's a
6 population factor, it's in essence the same
7 population factor that was in the old formula.
8 And this number changes every year based on the
9 NAHASDA numbers that are provided to us from HUD.
10 Those numbers come out in the end of July.
11 Sheldon takes the numbers in Albuquerque and sets
12 them up for us to run the tribal shares come
13 October 1.

14 The third factor, 34 percent, is in
15 the ratio of, 34 percent is divided equally among
16 the BIA regions. So, we kind of call that the
17 historic shares factor for the lack of another
18 word, and it's distributed to the regions and
19 then distributed to the tribes based on the
20 funding that the tribes receive from 2005 to
21 2011. So, you can easily go back and see how
22 much money each tribe made during that period and

1 run a percentage compared to the overall dollars
2 made available and then apply it to this factor
3 so that each tribe then gets money based on its
4 previous tribal shares.

5 So, that's how the new formula works:
6 eligible road miles, population, and past tribal
7 shares or historic tribal shares. Those are the
8 three factors. Nothing else. The road mile is
9 frozen. The past tribal shares are frozen. The
10 only thing that changes every year is the
11 population numbers that we get from HUD.

12 170.202 describes how the tribal
13 supplemental program funds are determined. One
14 of those set-asides -- we've got a question? Mr.
15 Healy.

16 MR. HEALY: John Healy, Transportation
17 Director. In regards to the population, has
18 there been any discussion on changing the, I
19 guess the data where that comes from? Because we
20 all know the population figures are under county
21 for most of the reservations.

22 MR. SPARROW: There has not been,

1 there was some discussion earlier, that would be
2 a good comment to provide. Thank you.

3 MR. HEALY: Thank you. Thank you very
4 much.

5 MR. SPARROW: So, the supplemental
6 funding was another set-aside that was put into
7 play by Congress to try to offset any negative
8 impacts of the new formula to the old formula.
9 And it's a distinct amount of money and Congress
10 again in 25 USC 202 and in MAP-21 tells us
11 exactly how that supplemental funding is to be
12 distributed. So, in essence, every penny of this
13 money is identified by Congress as to if it's
14 going to a set-aside or if it's staying in the
15 formula, if it's supplemental to the formula, how
16 it's going to be distributed out to the tribes.

17 So, 170.203, so those three sections
18 really talk about the primary tribal shares and
19 how the tribal shares get out to the tribes.
20 170.203 clarifies how the TTP planning funds are
21 distributed. And really, this wasn't changed at
22 all. It's still the 2 percent planning as it was

1 in the previous regulation, but we updated the
2 references in this particular section to reflect
3 the new 202 because, to kind of take it back.

4 Before MAP-21, the Indian Reservation Roads
5 Program was under 23 USC 204. And now with MAP-
6 21, they took the Tribal Transportation Program
7 and changed it to 202. So, the various statutory
8 references of the program have changed, so we
9 went in there and tried to update that.

10 And in addition, as Andy and others
11 have said earlier, when the regulation was
12 developed, the tribes all worked through the BIA.
13 And now the option is there for these additional
14 contracts or funding agreements with Federal
15 Highway and the G2G with BIA, so we just
16 reflected that update in that particular section.

17 Next statement. All references to the
18 IRR high priority projects have been removed.
19 Congress did not include the high priority
20 program as part of the Tribal Transportation
21 Program. What I said and referenced earlier this
22 morning was it is now a separate standalone

1 program, not funded with highway trust funds, not
2 part of the Tribal Transportation Program. So,
3 because this regulation pertains to the Tribal
4 Transportation Program, it has been removed from
5 the program. If Congress, and in that particular
6 section of MAP-21, Congress quite honestly cut
7 and paste what was in the reg, the old reg and
8 put it in the law, made a few changes but for the
9 most part 95 percent of it is what was in the old
10 original 25 CFR 170. So, it explains how the
11 program is to be carried out and the funding that
12 would be made available to the program should it
13 ever be funded by Congress. Now, under the new
14 regulation or new upcoming highway bill, if the
15 program is brought back in, obviously we have to
16 add this back into the regulation at that time.

17 170.204 identifies that TTP funds can
18 only be expended on activities and projects
19 identified in Appendix to Subpart B and contained
20 on the Federal Highway approved TTP. It's kind
21 of referencing back to what Matt and others said.
22 I mean we're saying that the funds have to be

1 used on activities identified in the reg and
2 approved on a TTP. You're not allowed to expend
3 the funds unless they're on an approved TTP. So,
4 looking at what the eligible activities are, as
5 Mr. Jaffe had said earlier today, we need to go
6 back and take a look at that to make sure that we
7 have covered everything that's covered in that
8 original part of 23 USC 202 with regards to other
9 eligible activities under this type. So, that
10 will be covered in that as well.

11 205 outlines the time frame by which
12 funds must be made available to the tribes. And
13 it talks about the 30 days after the funds are
14 made available to the BIA from Federal Highway,
15 the funds need to be made available for
16 distribution to the tribes. So, that also
17 references part of the statute of MAP-21.

18 The inventory and the long-range
19 transportation plan is defined under 170.225 and
20 it describes the correlation between the
21 inventory of the National Tribal Transportation
22 Facility Inventory and the long-range

1 transportation plan, and that those facilities
2 are developed through the long-range
3 transportation planning process. You identify
4 needs through your plan, you're trying to get
5 these facilities in loads onto your inventory so
6 that they become eligible. We have another
7 question? In the back corner, David, I'm sorry.

8 MR. KELLY: Dave Kelly, Oglala Sioux
9 Tribe. The 170.204, and I want to reflect back
10 to, I think it was the Subpart A where LeRoy was
11 where they removed the road maintenance clause in
12 there. I think we need to identify some of the
13 activities that belong with roan maintenance and
14 keep that section in the regs itself. Because if
15 I go ahead and put it on the TTP, some of the
16 activities that the road maintenance program do
17 are similar to a construction project, and
18 whether it be a slip lining, pipe project or not,
19 you know, in case we have a section of road that
20 falls off, and it does fall within the
21 maintenance criteria.

22 So, I can't have foresight to see that

1 these things do happen, but how do I cover it
2 under the TTP if we don't have the maintenance
3 activities identified at some point and the
4 eligible uses of the funding here?

5 MR. SPARROW: That's a good question,
6 David. I think for the most part, with working
7 with Federal Highway, we identified those
8 activities just under maintenance activity. We
9 don't get into each individual activity or the
10 dollars associated with it. When you look, when
11 we're going to get to Subpart G this afternoon
12 which talks about road maintenance and the
13 eligibility of road maintenance and the
14 activities that could be carried out, hopefully
15 that will answer your questions.

16 But from a TTP perspective, in the
17 past from the Federal Highway, I believe BIA is
18 the same way, you know, you're really just
19 looking at dollars that are assigned to
20 maintenance activities. Okay? Mr. Jaffe?

21 MR. JAFFE: Matt Jaffe, Sonofsky
22 Chambers. Bob, this goes to the point of 170.204

1 and also 170.111, what are the eligible uses of
2 TTP funds or what restrictions apply. That
3 catchall phrase in MAP-21, 202(a) that gets into
4 discretion of the Secretary needs to be
5 elaborated in the regulations. And it's not
6 enough to simply reference the statute in the
7 appendix. If the statute says other appropriate
8 public road facilities as determined by the
9 Secretary, the regulations should expand upon
10 what are other appropriate road facilities as
11 determined by the Secretary.

12 And by the same token, the other
13 catchall, there's two other catchalls, any
14 transportation project eligible for assistance
15 under this title, and then any transportation
16 project associated with the tribal government.
17 Mr. Kelly's comment about road maintenance is
18 that they have a transportation project dealing
19 with maintenance and tribes can re-purpose their
20 TTP funds, the regulations should make clear that
21 that activity is authorized under MAP-21 and is
22 authorized under the Part 170 regulations. You

1 shouldn't have to approve to a regional office or
2 whichever agency has the award instrument that
3 his particular maintenance activity is eligible.
4 But it would be helpful for the agencies to
5 elaborate on those provisions of MAP-21 in the
6 regulations, so it takes additional crafting on
7 the agency's part and preferably with
8 consultation of the tribes. Thank you.

9 MR. SPARROW: Thank you, Matt. All
10 right, let's move on. Subpart C, 170.226
11 identifies what data can be appealed by a tribe
12 and where you can find the appeal process for
13 other aspects of the Tribal Transportation
14 Program. This one just talks about the data, but
15 there are other appeal processes throughout the
16 reg, and this particular section references to
17 those other aspects of the Tribal Transportation
18 Program as well.

19 170.227 through 230 provides
20 information on the use of flexible financing,
21 leveraging funds to pay the loan back, and
22 ability of a tribe to apply for a loan from a

1 state infrastructure bank. Not a whole lot of
2 changes from what was there before. But one
3 thing, it also, we need to make sure it
4 identifies how long the payback should be
5 identified on the TTP. So, when flexible
6 financing has been used by tribes in the past,
7 what we've done is the payback of the loan that
8 particular year, say you borrowed X number of
9 dollars and your payback on that loan is \$100,000
10 a year, that \$100,000 is what's identified on
11 your TTP and ultimately approved for expenditure
12 of funds. So, that just clarifies that aspect.
13 Yes, sir?

14 MR. WRIGHT: Sherman Wright, Rosebud
15 Sioux Tribe. When you talk about payback, I was
16 wondering what streets or highways are in 2010 --
17 how many years?

18 MR. SPARROW: Say that again? I'm
19 sorry. When you're done.

20 MR. WRIGHT: How many --

21 MR. SPARROW: Right now, Mr. Wright,
22 the way Congress has said what the eligible miles

1 are, it's frozen to the 2012 inventory. So,
2 nothing regarding BIA or tribal roads that have
3 been added since 2012 are generating any
4 additional funding. If the road that you're, if
5 it's a brand new road, it won't be generating
6 funding. If it's a road that was in the
7 inventory as of 2012 and you've improved it, the
8 condition of the road is not a factor any longer,
9 it's just the mileage of that road. If it was in
10 there in 2012, then it generates funding; even
11 though you've improved it, it still generates the
12 same amount of funding. Okay? Got another
13 question, Matt?

14 MR. JAFFE: Matt Jaffe, Sonofsky
15 Chambers. Bob, I guess this question goes to the
16 flexible financing provisions, 170.227 to 230.
17 It's really more addressed to the BIA.
18 Certainly, we always appreciate regulations that
19 reflect the fact that tribes can use flexible
20 financing to leverage their TTP funds to finance
21 a project. That's included on the TTP.

22 What isn't clear from those four

1 regulation provisions is whether the BIA
2 acknowledges that tribes that contract under
3 Title 1 of the Indian Self Determination Act or
4 Title 4 can include flexible financing provisions
5 in the traditional 638 context. It would be
6 helpful if the regulations could clarify that,
7 not only under the BIA program agreement but also
8 the traditional Title 1 and Title 4 self
9 governance agreements, flexible financing
10 provisions can be part of that. It just makes it
11 easier for tribes to have one award instrument
12 that references all eligible activities including
13 flexible financing.

14 MR. SPARROW: Thank you. That's
15 pretty much Subpart C. All those tables and
16 everything that was in there before are gone.

17 Now, the cost to construct tables and
18 the costs are really still used by Federal
19 Highway and BIA to generate a need to show to
20 Congress that the needs of the Tribal
21 Transportation Program are X number of billions
22 of dollars to help try to increase the funding

1 amounts that are being made available to the
2 program. But when it comes to the distribution
3 of the tribal shares, as I said before, under
4 this new formula, it's miles, it's population,
5 it's historic. And that's pretty much all that's
6 there at the moment.

7 Well, I'll turn it over to Sheldon
8 here to talk about Subpart D. Thank you very
9 much. Let me, before he transitions, is there
10 anyone who has not signed up on the sign-in
11 sheet? Please do that when you go out to lunch
12 or come back. And then we'll also, when we come
13 back from lunch, we'll probably ask if anyone has
14 not been introduced to please stand up and
15 introduce yourself. Thank you much.

16 MR. MOGAN: Before we get to the next
17 section, I'm Marc Mogan, Tribal Engineer, Prairie
18 Island Indian Community. I'm Co-Chair of the
19 Advocacy Council for Tribal Transportation in the
20 state of Minnesota. Co-Chair is also Jason
21 Hollinday. And we want to submit a letter for
22 dual language signs.

1 MR. HOLLINDAY: Did you want us to
2 read the letter or just submit the letter?

3 MR. CAULUM: Just submit it to me,
4 I'll take it.

5 MR. HOLLINDAY: All right. Thank you.

6 MR. CAULUM: Thank you very much.

7 MR. HOLLINDAY: Jason Hollinday, Fond
8 du Lac Reservation.

9 MR. KIPP: Can you hear me? No? Can
10 you hear me now? Okay. Subpart D. I'm going to
11 be going through several of the subparts kind of
12 a little bit, then in detail. I will be
13 referencing certain key words and certain
14 addition of words for each of the questions over
15 and beyond what's actually on the screen. So, if
16 you have your copy with you, get your regs out
17 and go for the questions. I'll be circling,
18 highlighting certain questions that basically
19 change the question and answer as far as the
20 existing regs now.

21 The first from the subpart pertains to
22 transportation planning, updates the relationship

1 of transportation planning for the TTP, number
2 400. Very much similar to the existing reg.
3 401, that particular question,
4 basically, the minor change there is it says BIA
5 and FHWA. And that's going to be a lot of the
6 changes in the transportation planning of the TTP
7 portion of that. The actual adding of "and FHWA"
8 to the question is basically either in there or
9 in the absence of it. The purpose of that is
10 basically identifying that tribes who actually
11 have Federal Highway agreements no longer may be
12 participating as much as they used to in the
13 transportation planning functions with the BIA.
14 But they do have to participate with the Federal
15 Highway, so FHWA is included to allow the
16 questions and answers in some of these, this
17 subsection.

18 Number 402 updates tribal list of
19 funding activities to reflect program changes.

20 403 basically identifies what the
21 planning funding can be used for. No significant
22 change there.

1 Number 404, can a tribe use
2 transportation planning funds for other
3 activities? The answer there is yes. But you
4 have to be able to identify it on the TTP. What
5 are you going to do with your planning? What are
6 you going to do with your planning funds? And
7 then we're talking about 2 percent planning funds
8 there.

9 You'll notice that in question 404,
10 can a tribe use transportation planning
11 activities funds for other activities, the answer
12 is yes. You'll notice that in this particular
13 reg there is no limitation. I mean there used to
14 be a \$35,000 or a 5 percent cap on what you could
15 actually use the planning funds for, that
16 reference is no longer in the proposed
17 regulations.

18 And for TTP reviewing purposes, I used
19 to really pay attention to that because there's a
20 lot of tribes who actually have under
21 construction TTP have used for support their
22 transportation planning activities. I used to

1 always track who were the ones to use over
2 \$35,000 or who wants to use over 5 percent. I
3 used to add little comments on it. But 404, just
4 be reminded that there's no restriction. If you
5 want to use 100 percent of your transportation
6 planning funds to support a construction project,
7 you're okay to do that without any extra
8 documentation because it is identified that there
9 is no restriction on that.

10 405, can tribes use transportation
11 planning funds for other activities? The basic
12 answer is yes, that is very much in line with the
13 existing regulations. You will notice that in
14 portions of the reg, when there's a gap of
15 questions and answers in the proposed reg, just
16 like there's a gap there between 406 and 410, it
17 doesn't make any reference in it. So, there's
18 probably some sort of excerpt saying that 406 to
19 409 is reserved or something like that. You'll
20 see that, you'll catch that it was done I think
21 in Subpart B, there was a reference to a gap in
22 the questions because it does jump from 405 to

1 410. And again, your regs will probably be
2 updated for that.

3 410, what is the purpose of long-range
4 transportation planning? A lot of those are
5 basically still there. The reference to 20 years
6 is still there as far as the term of the long-
7 range transportation plan. Again, FHWA is added
8 to some of the subparts within the answering of
9 the questions.

10 412, it adds FHWA.

11 413, what is the public role in
12 developing a long-range transportation plan?
13 Again, BIA, FHWA and the tribe must solicit
14 public involvement. That is something that,
15 although we've always made a comment about that
16 at various meetings, it is very important. I
17 think with the finalization of this particular
18 reg, I believe there's probably going to be a lot
19 more checklists developed to make sure that some
20 of this stuff is actually verified.

21 I think one of the ways that we saw,
22 in some of the tribe submission of the LRTP in

1 the appendix, we see a lot of tribes adding the
2 public -- will cut out the newspaper and actually
3 it's a part of the appendix, we can actually see,
4 but although we still see to a certain extent
5 decisions being made outside the public process,
6 we want to try to eliminate those as much as
7 possible because we do know that things happen in
8 the field that are basically like those comments
9 before that are unplanned for. ERFO projects
10 happen, emergency projects happen. But you have
11 to be reminded that these are still public funds
12 and the public notifications and the public
13 hearings must still be done.

14 Going on to 414, how is a tribal long-
15 range transportation plan used and updated?
16 Identify and justify the tribe's updates to the
17 NTTFI. That is one thing that we've identified
18 before is that when we add new facilities to the
19 inventory, whether it's a road or a bridge or
20 transit building, an administrative building, a
21 salt shed, some sort of maintenance structure,
22 the LRTP must be the document that identifies and

1 justifies the addition of those facilities to the
2 NTTFI. And I think once these regs are actually
3 finalized and we start the implementation
4 process, that's probably going to be one of the
5 things that our office in Albuquerque is going to
6 be setting up as far as making sure that that is
7 being done. The LRTP is your key transportation
8 planning document that identifies what, how
9 you're going to use your TTP funding.

10 Just an additional note on 414, on the
11 last sentence of that particular question, the
12 TTP long-range transportation plan must be
13 reviewed annually and updated at least every five
14 years. Question?

15 MR. SMITH: Hello, John Smith for the
16 record. Has there been an explanation, the
17 issues you were talking about, in developing the
18 long-range transportation plan and et cetera, how
19 long is it estimated that these rule changes must
20 be finalized? And what is the process? I don't
21 think that's been explained.

22 MR. KIPP: Can you answer that, Bob?

1 MR. SPARROW: Could you restate that?
2 I'm sorry, Mr. Smith.

3 MR. SMITH: We're talking about the
4 rule changes here today at this meeting. So,
5 when the rule changes that we're receiving
6 comments on and suggesting the cutoff date. Are
7 you going to review a time line at the end of
8 this session of when they would be made
9 available? What's the expected date of
10 finalization? And the finalization process for
11 the --

12 MR. SPARROW: The whole process?

13 MR. SMITH: -- whole process. It
14 hasn't been explained.

15 MR. GISHI: The question was what is
16 the process after this follow-up in terms of
17 regulations, the time table of going to a final.
18 Generally, after the notice of proposed
19 rulemaking, it is associated with a closing date
20 and comments. It was mentioned this morning that
21 that date is March the 20th.

22 Now, there is a section at the front

1 in the preamble that talks about that the
2 Department does, on all the rulemaking that it
3 has, and that is the information collection
4 process, the laws require that any time a federal
5 agency puts out regulations and it has certain
6 information that requires to be collected, it has
7 to go through a formal process of requesting
8 comments on that. That comment process is, if
9 you're going to comment, that's at a different
10 location as far as the website on there, and the
11 dates are earlier than that. So, if you're
12 commenting on information collection, that's
13 earlier than what the March 20th time line is,
14 again, because that's separate from the Agency's
15 rulemaking which is what we're talking here.

16 When that closes or near the time it
17 closes, depending on what kind of comments
18 generally that are coming about, there's options
19 to either extend it or, at that point, to begin
20 looking at the comments, to go through the
21 process of reviewing those. And then generally
22 within the time line anywhere from six to nine

1 months, the final rule comes out. Obviously, we
2 are hoping that this is much, in terms of the
3 comments and everything else, we can get that
4 done much more expedient because there's a couple
5 of things that are hinging on that.

6 First of all, we know MAP-21 is going
7 to be expiring. And also, the fact that as part
8 of the hearings that we have with Congress, that
9 was one of the comments that they made was when
10 are we going to update the regulations. And so,
11 we are on a time line with that also.

12 So, given that, that's the next
13 process. At that point, there will be a final
14 rule published. And then, of course another
15 comment period will be associated with the final
16 rule. And then eventually, it would go, after
17 the comment period closes, the rule will go up to
18 Congress for, I think it's 90 days, I think it's
19 required by law, and after which it becomes final
20 in their eyes. If they have any comments or
21 things that they want to change, they'll have an
22 opportunity to make those changes also.

1 So, if you're here looking at that,
2 that's in motion probably another nine to 12
3 months on the long end.

4 MR. KIPP: Okay. Just to review,
5 where we left off was 414. 414, how is a tribal
6 long-range transportation planning used and
7 updated? Again, it basically identifies that
8 here, any work that you're going to do on a
9 facility, road, bridge or other facility, must be
10 in the LRTP. And there's also a grammatical
11 change there that basically changes, I believe
12 it's the word "should" is changed to "must."

13 PARTICIPANT: Can we change that to
14 "shall?"

15 MR. KIPP: Again, simple words like
16 that will basically create additional work for
17 the transportation agency. So, pay attention to
18 that. There is a word in there that wasn't in
19 the existing reg, it says "should"; the new
20 proposed regulation says "must."

21 415, what are pre-project planning and
22 project identification including? Basically,

1 it's pretty much the same wording as the existing
2 regs for 415.

3 Approved questions have been, numbers
4 are basically in reserve, 416 to 419. It's no
5 longer there.

6 But 420, what is the tribal priority
7 list? It's very much similar to the existing
8 regs. What is the tribal priority list?

9 Basically, this particular question or this
10 particular answer does combine the previous or
11 existing answer into just one solid paragraph.
12 There are several options as far as what does the
13 tribal priority list can contain. But again,
14 it's a combination of, instead of A and B and C
15 and D, it's one conclusive paragraph now. But
16 the general answer is the same.

17 Transportation improvement program,
18 421, what is the tribal transportation
19 improvement program? Basically, the significant
20 change, well, the change in here for 421 is the
21 term "financially constrained" is now added to
22 what we call the TIP, the TIP. The term

1 "financially constrained" is now in one of the,
2 it helps define the TTP. And there's been a lot
3 of conversation in the past as far as what does
4 "financially constrained" mean.

5 For this particular question, this
6 particular answer, financially constrained
7 basically identifies that whatever your tribal
8 share had been determined by the formula, that's
9 the financially constrained defined. If the
10 tribal share is one million dollars, your TTP
11 basically is going to be worth approximately one
12 million dollars. And again, financially
13 constrained is added to these proposed regs for
14 that particular question.

15 422, what is the TTP, Transportation
16 Improvement Program? Basically, that's very
17 similar to the first part of that, but the latter
18 part in B basically identifies that for this
19 particular question, you're answering the
20 question what is an eligible, what is the TTP.
21 There is a small excerpt in there that basically
22 says, "However, all requirements associated with

1 that project or activity must be satisfied before
2 expenditure actually occurs."

3 Again, this is a question and answer
4 for the TTP. It goes back into treating this
5 like if you are contemplating at this point in
6 time on purchasing equipment, whether it's road
7 maintenance or construction, it's included in the
8 LRTP as an item under road maintenance or
9 construction that you're planning for. And
10 simply because the equipment purchase is approved
11 on your TTP doesn't mean that you can go out
12 there and buy a piece of equipment right off the
13 bat. There's other documents, the justification
14 for lease versus purchase must be done.

15 Taken in the same context is that when
16 we approve a brand new project for the
17 construction phase, and the TTP has the
18 construction phase approved, does that mean you
19 can go out and start moving dirt tomorrow? No.
20 Archeological, environmental, rights of way, all
21 the documents that are pertinent to the actual
22 approval of that activity must be satisfied

1 first. And that was that particular comment that
2 adds to this particular answer for that question.
3 Yes?

4 MR. SMITH: John Smith again for the
5 record, Shoshone and Arapaho Tribes,
6 Transportation Director. As you were mentioning
7 prior, the equipment has to be put in to the road
8 maintenance TIP. To my knowledge, I have never
9 done a road maintenance TIP like in a road plan.
10 I haven't done a TIP for road maintenance other
11 than putting road maintenance as the heading into
12 the TIP. But as far as developing a TIP for road
13 maintenance, we have a work schedule. We don't
14 have a tribally approved TIP for road
15 maintenance, we've got a work schedule there.

16 So, we do adjust to disasters to
17 whatever, roads fall in, culverts, et cetera, but
18 we don't do a TIP for the road maintenance. And
19 I think that's what you said, I was listening
20 quietly.

21 MR. KIPP: Okay. Okay, let me see if
22 I can clarify that explanation. Basically, what

1 I meant there was that in your long-range
2 transportation planning process, if road
3 maintenance is an activity that you wish to
4 support using TTP funding through your long-range
5 transportation planning, then road maintenance
6 becomes a project on your tribal priority list.
7 And within each project, you should have a very
8 good idea of what are you going to do to support
9 road maintenance. Are you going to purchase the
10 equipment? Are you going to buy supplies? Are
11 you going to provide salary for personnel? And
12 basically identify it so that when you use the
13 funding, it is actually a part of the TTP
14 process, you're basically identifying what road
15 maintenance is.

16 Because we have a lot of tribes that,
17 although they have road maintenance as an
18 activity on their tribal priority list which is
19 in their long-range transportation plan, they
20 don't actually support road maintenance tasks.
21 They're basically just purchasing the equipment
22 because that is the immediate benefit for the

1 support of road maintenance programs, to get
2 through that program new pieces of equipment.
3 And again, it goes back into just because a TTP
4 approves road maintenance and the scope of work
5 for that plan basically says, you know,
6 purchasing equipment, it doesn't mean there
7 aren't another paperwork, there isn't other red
8 tape that have you to do to actually go and do
9 it, do the procuring. Question?

10 MR. ROUSSEAU: Rick Rousseau, Cheyenne
11 River Sioux Tribe. Back to your road
12 maintenance, any disasters, you know, we all got
13 little rivers running through our roads. You
14 know, they've been eroding for years, but nothing
15 has ever gotten done with them. There is not
16 enough money to go back in there and redo them.
17 One particular road I think has got five cuts in
18 it, Route 2. But yet the maintenance money we
19 got, there is not enough there to go back in
20 there to haul riffraff in and to redo them all.

21 Natural disasters, you know, these
22 culverts that should have been inventoried 20

1 years ago that are rutted out, how do you know
2 when a road is going to cave in? You know,
3 that's a disaster when Mother Nature comes in and
4 when a creek starts growing. There is nothing
5 here set aside for that. When FEMA steps in, you
6 know, wow! How do you run a skid loader for \$10
7 an hour and put a man in it \$20 an hour? You
8 know, I'm shooting from the hip, my numbers are
9 probably off, but the point is being made, you
10 know.

11 Everybody's got natural disasters, but
12 there is nothing in here to offset that. Maybe
13 in another meeting, you know, but it needs to be
14 addressed.

15 MR. KIPP: Thank you. 423, how are
16 projects placed on the TTP-TIP? For this
17 particular question, it does identify that there
18 is no more reference to the three to five-year
19 TIP. It basically references there is a four-
20 year TIP. That is one of the updates from the
21 existing regs to the proposed regs is that all
22 TIPS must be four-year, not three to five.

1 That's just a general note there for that
2 particular question.

3 And in the answer there, there is also
4 a reference to non-BIA or non-tribal facilities
5 that are actually on the TIP. It pertains to the
6 share of the owner of the non-BIA or non-tribal
7 participation in projects, there's some new
8 wording in there.

9 424, how does the public participate
10 in developing a TTP-TIP? Basically, the question
11 is very much the same. The only difference is
12 that the BIA, that acronym is removed from the
13 answer. That is just one of the changes there.
14 Yes?

15 MR. HEALY: John Healy, Transportation
16 Director, Fort Belknap. In reference to 170.422-
17 B, the last sentence, does that also include
18 submissions or 425's?

19 MR. KIPP: I'm not sure what a 425 is.

20 MR. HEALY: The 400 and 425, a
21 financial, your finance department fills that out
22 on a per project basis. You guys want more --

1 MR. KIPP: Oh, I would say yes. Yes,
2 that's more of a reporting form for I believe the
3 Title 1 document. But I would say yes.

4 That would be considered part of your
5 TTP project management responsibilities as far as
6 the general authority for the Title 1 reporting
7 for that --

8 MR. HEALY: Thank you. Thank you very
9 much.

10 MR. KIPP: 425, how do BIA and FHWA
11 conduct the annual update to the TIP. Basically,
12 it does identify and add the word "annual" to the
13 question. And it also eliminates the reference
14 to July 15th in the answer. Just a couple of
15 things there for that particular question there
16 is that it does remove the July 15th reference as
17 a yearly update date.

18 426, how is the TTP-TIP approved?
19 Basically, that particular answer, or question
20 and answer is more for the oversight of all.
21 Once you as a tribe or an entity develop an LRTP,
22 come up with the tribal priority list, create the

1 TIP and you submit it, what do we as federal
2 agencies, the BIA and Federal Highway, what do we
3 do? That's basically what this answer does. It
4 basically clarifies what does the BIA do, what
5 does the FHWA do, in the approval of the TIP
6 process.

7 How can a tribe amend and approve TTP-
8 TIP? Basically, there, the question and answer
9 are very similar to the existing reg. But I just
10 want to again find the reference to public. The
11 public process must be followed, and that is
12 something that we really need to kind of pay
13 attention to there is the public process.

14 427, how is the State Transportation
15 Improvement Program related to the TTP-TIP?
16 Basically, the answer is very much the same. All
17 of your tribal TIPS -- submit and approve, they
18 are all incorporated in your STIP, State
19 Transportation Improvement Program where your
20 tribe is located.

21 Public hearings. When is a public
22 hearing required? Question and answer there is

1 very much the same as the existing regs. And
2 that's basically pretty much for the first two
3 questions. Okay.

4 Okay. I guess, Mr. Sparrow or Mr.
5 Gishi?

6 MR. GISHI: We have someone in the
7 meeting this afternoon who wants to make a
8 comment for the record before we broke for lunch.
9 So, we're going to suspend our Subpart D and
10 start back up this afternoon, but we wanted to
11 turn the time over to Mr. Greendeer.

12 MR. GREENDEER: (Short Indian speech.)
13 Good afternoon. Thank you. I was going to offer
14 something to say today on behalf of the Ho-Chunk
15 Nation of Wisconsin. Again, my name is Jon
16 Greendeer, I am President of the Ho-Chunk Nation.
17 We have a delegation, quite a delegation here.
18 We set up a village here on the corner. You're
19 welcome to come visit us anytime.

20 But I believe, you know, I've seen it
21 imperative that we address a couple of points
22 which you will go into detail much later on

1 during the program. Today, we are here together.
2 We share an occupation, a livelihood, a lifestyle
3 very similar to our brothers and sisters here
4 today. Our job is to take care of our tribal
5 members. We have folks that are cold and sick
6 and old, and that's what we do in a regular day.
7 So, to branch off and come together for something
8 like this is something that I believe is rare but
9 it is for a good reason.

10 This isn't a history lesson but I do
11 want to share why we are here in numbers and why
12 this is very important and why we will continue
13 to be a part of this discussion and see this
14 through. Unlike a lot of tribes, the Ho-Chunk
15 has a history that has led to a disenfranchised
16 land base. Before the states were established,
17 our territories ran from Green Bay area all the
18 way to the cities, Northern Iowa, Illinois.
19 Later on, as the Federal Government wanted to
20 establish claim for the territory we call Ho-
21 Chunk land, they had shipped us off through
22 policies of removals, assimilation and even

1 extermination. Even in this very state along the
2 railways stand mounds of our Ho-Chunk ancestors
3 who were buried when they died in the railroad
4 cars here. They were shipped off to Northern
5 Minnesota, Iowa, and ultimately settling out for
6 a portion of a reservation in Nebraska.

7 This has changed governance as we know
8 it. Imagine your tribe broken into over a dozen
9 pieces and scattered across the land. This has
10 evolved into a unique form of governance in that
11 the things that we do in trying to preserve the
12 equity and fairness for tribal members, it comes
13 at a cost. And these costs have propelled us to
14 sit alongside with a lot of different government
15 entities.

16 Now, I've heard "I don't trust the
17 Long Knives" and "I don't trust governments."
18 But if we don't sit down and work with these
19 governments and work with our state and work with
20 these local municipalities in establishing mutual
21 agreements, then we get nothing. At all. Our
22 tribal members get nothing at all. And I could

1 raise my fist and I could get upset, but
2 ultimately our goal is to use our dollars a
3 little bit more wisely to benefit our
4 communities. And they might not be tribal
5 members in these communities but we use these
6 roads as access roads for commerce, for our
7 livelihood, for safety.

8 Thanks to SAFETEA-LU, we've been
9 allowed to participate in a lot of programs and
10 use these dollars to continue working with these
11 other agencies to provide safe roads. In the
12 last couple of years, we've done eight major road
13 projects, six of them cleared out some of these
14 very dangerous roads. Now, all tribes have
15 those, they do. We've done a couple of bridges.
16 But most importantly, we've assured to our
17 communities that this very costly item is done
18 with the best intent. There is no rich tribe at
19 the end of this. This is done to preserve an
20 equitable area.

21 Now, the history that we have isn't
22 one of our own creation. We have trust

1 properties in 14 different counties even in this
2 state. There are access roads there and we look
3 at probably about 1,300 members and a pretty
4 heavy traffic to each one of these communities.
5 Our job is to make sure that they are preserved
6 so that they can continue living a livelihood.

7 Now, I'm the kind of guy that writes
8 a bunch of stuff down and never actually says
9 anything I wrote down, so I apologize in advance.

10 We have also, along with the roads program,
11 worked on and have six county law enforcement
12 agreements. We have over eight inter-
13 governmental agreements to which we share
14 resources. This is the government we have to
15 create.

16 Now, the need is growing. We didn't
17 come here today empty-handed. We didn't come
18 here with a closed mind. We came here with some
19 recommendations for some amendments for Part
20 170.444 and 445. We came here with some language
21 that I don't think is going to be best argued
22 boldly or be persuasive or, you know, Washington,

1 D.C. coercive. I think the best language has to
2 be reasonable, it has to be logical, it has to be
3 inclusive of even --

4 We have a responsibility to create a
5 system, I mean I think we're dealing with a
6 limited resource here, but I think what we've
7 presented, what we preserved, and we may trade
8 paint with other tribes, we realize that going
9 into this. But I strongly challenge folks to
10 take an inclusive look. One thing you won't hear
11 from those who are arguing against access roads
12 and proposed roads is acknowledging that there is
13 a need for access roads and proposed roads, and
14 there is. We, our people, benefit by making some
15 of those nominal changes in our communities.

16 So, with that, I want to say that the
17 Ho-Chunk Nation of Wisconsin and beyond have
18 established themselves as a true example of what
19 the intent of those tribal transportation dollars
20 were meant to be used for, what the intent of
21 SAFETEA-LU was put in place for. And you will
22 hear that over and over again, that what the

1 intent of this law was to create safe roads in
2 Indian communities.

3 A great majority of our native people
4 live off of their reservation. That's a fact.
5 We can have opinions about everything they have
6 to say, but the fact remains that most of our
7 tribal members live off, our remaining trust
8 properties, most tribal members live off of their
9 reservations. In order to create commerce, we
10 have to be, you know, equitable. And I think
11 that we have established here today a forum in
12 which we hope is considerate of some of the
13 language that the Ho-Chunk Nation is presenting
14 and some of the thoughts and ideas that we wish
15 to convey throughout this and other programs to
16 come.

17 So, I want to thank everyone for their
18 attention here. This is very difficult. As you
19 can see, I'm not a guy who can sit and read
20 policy and recite codes and things like that.
21 But I want to let folks know that we're here for
22 a very important reason, to establish that we

1 have language that will be equitable and suitable
2 for the amendments forthcoming.

3 So, again, (short Indian closing.)

4 MR. GISHI: Thank you. Thank you.

5 With that, we'd like to, at this time, stop at
6 the portion we're on in Subpart D and continue
7 that at 1:30. And if anybody wants to leave
8 something here, I believe we'll have people here
9 during lunchtime in the room. Otherwise, if we
10 do, we will lock it up and we'll open it back up
11 at 1:30. Thank you.

12 (Off the record.)

13 MR. KIPP: Subpart D, the next

14 subsection that we'll be talking about is the TTP
15 facility inventory. Basically, this is replacing
16 the IRR inventory with a series of questions.
17 Most of them are just updated for SAFETEA-LU and
18 for MAP-21.

19 Starting out with Question 442,
20 describe the NTT tribe and what is included.
21 Statutory language is basically inserted into the
22 question and the answer. The question, what is

1 the National Tribal Transportation Facility
2 Inventory, it basically references back,
3 immediately back to the definitions of 25 for the
4 NTTFI. In this particular answer, there's an
5 additional portion that was not in the existing
6 regs. I believe it came up earlier today, part
7 C, "The secretaries may include additional
8 transportation facilities in the NTTFI if the
9 additional facilities are included in a uniform
10 and consistent manner nationally."

11 From just looking at the IRR inventory
12 versus the NTTFI, the word "facility" is
13 basically primary to that. Our inventory has
14 expanded way beyond a road and a bridge. We have
15 a lot of other types of transportation facilities
16 in the inventory. I believe up here we might
17 have, we have some public docks. In different
18 areas of the country we have pier docks, barge
19 docks. We have boardwalks. All these are
20 transportation eligible and eligible for funding
21 on the TTP. So, the facility inventory basically
22 is a primary acronym change for our program.

1 One last thing to note in 442, the
2 last portion identified that bridges must be
3 inspected and must be recorded in the National
4 Bridge Inventory. And what's important there is
5 that there is no distinction between tribal
6 bridges and other public bridges. That is
7 something that MAP-21 basically had identified is
8 that all bridges on the public system must now be
9 inspected and reported to the National Bridge
10 Inventory. The National Bridge Inventory is
11 basically maintained and updated by Federal
12 Highway Administration. Just be aware of that,
13 that last portion for that particular question
14 refers to the inspection and recording for
15 bridges.

16 443 defines the proposed facility and
17 includes the process and requirements to
18 successfully include it in the NTTFI. Question
19 443 is basically a brand new question, brand new
20 answer, and there's a lot of identification of
21 required documents for proposed facilities. You
22 have a proposed road, you have a proposed bridge,

1 you have a proposed administrative building, a
2 transit building, whatever may be the case,
3 remember that those facilities must be identified
4 in your LRTP. That makes them eligible to be put
5 in the NTTFI.

6 But again, 443 basically identifies
7 for a proposed facility what are some minimum
8 documents that must be identified and uploaded
9 into our database so that they can be reviewed as
10 far as justification for proposed facilities.
11 There's a lot of documents there for that
12 particular question and for that particular
13 answer. So, you want to pay attention to
14 reviewing those because at this point in time, if
15 the proposed facility is in the inventory today
16 and these regs get finalized, those requirements
17 will be placed on those existing facilities, as
18 well as the new ones that come into play in the
19 next few years.

20 So, if you have proposed facilities,
21 you might want to pay attention to this question
22 and answer because at some point in time, if

1 those documents are not provided in some way,
2 shape or form, the implementation of the new regs
3 will adjust. Should we take it out of the
4 inventory? Or what is the process? What do we
5 have to do? But again, that's 443, brand new
6 question for proposed facilities.

7 170.444 describes how the NTTFI is
8 updated. The major change here is that it's kind
9 of broken into four sections. The proposed reg
10 basically identifies questions and answers
11 pertaining to new facilities that are being added
12 to the inventory. There is also another section
13 identifying what to do and how to update existing
14 facilities that are already in the inventory.

15 There is also a subsection identifying
16 the appeal. If you try to submit a particular
17 facility inventory and you get a no from the
18 region or you get a no from BIA or you get a no
19 from Federal Highway, what's the appeal process?
20 And there's a small reference in there for that.

21 The last portion is basically
22 identifying that September 30th of every year,

1 just like any other database, databases are
2 basically consolidated and we report them. At
3 some point in time, somebody is going to want to
4 know how many BIA bridges do we have, how many
5 BIA roads do we have, how many tribal bridges,
6 tribal roads. Although you can submit
7 information into the inventory pretty much year
8 round, at some point in time we have to stop the
9 database and say this is the final 2014 mileage,
10 this is the final 2014 bridges, because we must
11 submit data. So, that's basically a new part for
12 that particular question in 444.

13 445, what is a strip map? Basically,
14 that particular question, 445, is basically very
15 similar to the answer in the existing regs.
16 Scale, those types of things. What is basically
17 included on the existing strip map is very much
18 the same.

19 446, the second part to the minimum
20 attachments question. That is a brand new
21 question and it's a brand new answer as far as
22 the regs. 446, the basic question is what

1 minimum attachments are required for an NTTFI
2 submission. Comment?

3 MR. GARVIN: Henning Garvin, District
4 II Representative on the Ho-Chunk Nation
5 legislature. Good afternoon. Thank you guys for
6 coming out.

7 This deals with two different areas
8 within the rule, particularly with the inventory
9 and the effect that could be had on, the change
10 that's being made on Subpart A, on the definition
11 of an access road. We did have the opportunity
12 to attend the consultation in Sacramento. And at
13 that time, we had posed a question on whether or
14 not it was the intent of the Bureau to remove
15 roads from the inventory based on this new
16 definition of access roads, if it was going to be
17 placed into the rule exactly as been presented.

18 At that time, if I recall correctly,
19 the answer we received from the Solicitors Office
20 was that it would be premature to answer that
21 question now, and that that would have to be
22 contemplated in the preamble to the final rule.

1 I'm wondering if there has been an opportunity to
2 consider that any further, or if that is still
3 the same stance as of this point if we were to
4 ask the same question?

5 MR. KIPP: To my understanding, I
6 believe it is the same response back is that I
7 believe that the question that was posed in
8 Sacramento was if this is finalized as a final
9 rule, what's our implementation of the final
10 question and answer. And that's something that
11 at this point in time we just can't answer right
12 now until the final rule is final. And then the
13 implementation of how are we going handle access
14 roads, how are we going to specifically handle
15 proposed roads will be handled at that time.

16 And I believe I added to that answer
17 that, as we move forward in handling access
18 roads, as we move forward in handling proposed
19 roads, we as the BIA and Federal Highway, we
20 intend to utilize the coordinating committee to
21 basically identify this is the final question,
22 this is the final answer, this is how we propose

1 to implement this particular section of the
2 regulations and vet it through the coordinating
3 committee as far as our first feel for the
4 implementation process.

5 MR. GISHI: One of the, just to make
6 sure we're clear on that, you're asking is the
7 intent, because of the definition to take access
8 roads, roads that are on the inventory, off the
9 inventory?

10 MR. GARVIN: If they don't really meet
11 the definition.

12 MR. GISHI: The roads that are in the
13 inventory, the National Tribal Transportation
14 Facilities Inventory right now are the roads
15 which are eligible. The process of taking them
16 off requires, there's a number of steps of how
17 that would happen, and that would certainly
18 involve consultation with the tribe itself
19 individually. I do know that the coordinating
20 committee is talking about developing a, what
21 they call a quality control group to review new
22 submissions. So, this wouldn't fit into that

1 area, but certainly they would have
2 recommendations also and there is a
3 representative from the -- on that. The whole
4 idea is part of the definition of access road is
5 really to make sure that we got a definition in
6 there to address it because it is, they are roads
7 which are in the, not only eligible in terms of
8 the program but also you know that the new
9 program that came about from Federal Highways,
10 the Federal Lands Access Program or the FLAP,
11 that looks at access roads as roads coming in to
12 federal lands, tribal lands and so forth.

13 And so, that definition needs to be
14 there in order to be able to, and try to qualify
15 it under that program. So, that's one reason why
16 that's in there. But as far as to try and start
17 removing roads, unless there's a reason to do
18 that, I don't think that's the intent with this
19 process.

20 But you're right, you had asked the
21 question in Sacramento to make it part of the
22 public record. And I think it will be addressed

1 as we receive other comments also. So far, the
2 only questions we've had regarding access roads
3 has been of that nature that you described.

4 MR. GARVIN: I just have a follow-up,
5 Henning Garvin again. Well, I do appreciate
6 that. At the time, it was very alarming actually
7 to hear the response that we were given because
8 not giving a full thought and being able to
9 articulate what the implementation process is
10 going to be and just coming to tribes, we will
11 publish this in the final rule greatly shortens
12 our ability and our times to understand how it's
13 going to impact our programs, our people, and our
14 infrastructure. And that kind of undermines the
15 whole process of consultations.

16 There was a little bit more to the
17 answer today. I'm appreciative of that, but I'm
18 still a little alarmed now that there has not
19 been more thought into how strictly it's going to
20 be implemented so that we have the opportunity to
21 analyze that information. Once again, I think
22 that's just part of the consultation process.

1 I also want to bring up, with regards
2 to the definition itself, I'm a little
3 disappointed in that, and I'm new to this but
4 from what I understand is that the coordinating
5 committee unanimously voted in 2012 to accept the
6 definition of access roads. I believe we have
7 the minutes that are available for that. Now,
8 understanding that the formula has changed and
9 now that's, you know, described within the
10 statute, I believe that the definition that they
11 recommended unanimously once again is wholly
12 suitable. And I was alarmed a little bit that
13 that's being discounted, that that's not being
14 included in the new definition of access roads,
15 that that's not being taken into account.

16 That being said, I don't like to stand
17 up and make a complaint without offering some
18 solutions. As our president stated earlier, we
19 do have some recommended language that does
20 encompass and takes into account what the
21 coordinating committee had voted on and agreed
22 upon. It takes into account some other

1 situations so that it removes any ambiguities so
2 that the tribes are well aware of what would take
3 place if this definition were to be put in place.
4 And I believe that's going to be submitted or if
5 that hasn't been already. Thank you.

6 MR. KIPP: Comment received. Thank
7 you very much. The definition that he's
8 basically referencing was reviewed very quickly
9 earlier this morning. It's actually on page 198
10 of the Federal Register that you have. And I
11 only used the last four numbers, it's actually
12 76198 in Subpart A under Definitions, 170.5. The
13 second definition says, "Access road is defined
14 in 23 CFR 635.117 term E." There is the
15 definition of the access roads. It basically
16 identifies in the 23 CFR what the definition of
17 an access road is.

18 And then additionally, there's a last
19 sentence in that particular definition that
20 identifies the maximum length of an access road
21 will not exceed 50 miles. So, if you have access
22 roads in your inventory, you want to particularly

1 pay attention perhaps to 446, minimal
2 attachments, and then make reference to your
3 definition of access roads. Question?

4 MR. SPRINGER: Tom Springer, outside
5 counsel of Ho-Chunk Nation. You do have our
6 proposed language for inclusion in amending the
7 25 CFR Part 170. What we're proposing which adds
8 a lot of detail which the definition that you're
9 proposing in 170.5 -- is essentially what the
10 coordinating committee did pass by consensus.
11 And I think it's essential that the BIA and
12 Federal Highways include that in the regulation.
13 If there are standards, you know, it's not for
14 information, it adds a lot of detail and it's
15 very appropriate to place it in the regulation.

16 We are willing to work with, you know,
17 work to develop different language or tweak the
18 language that we've offered. But we think it's
19 absolutely necessary that it be included in the
20 regulation. If you're not ready to do that, then
21 just leave it out for now, that's our position.

22 The draft that we submitted, first of

1 all, it leaves your proposed definition in place
2 in 170.5, but it also creates a definition in
3 170.5 for primary access route. Over the years,
4 there's been a lot of confusion about access
5 roads versus primary access routes. Most people
6 I think consider them the same thing. But if you
7 look under 23 USC Section 202(D)(1)(b)(vi)(6),
8 and I'm just kind of paraphrasing, are public
9 roads within or providing access to an Indian
10 reservation or Indian trust land or restricted
11 Indian land, or (b)(ii)(7), emphasis on 'or', are
12 primary access routes proposed by tribal
13 governments.

14 That explains, that's in the statute,
15 that's what authorizes what can be put on to the
16 inventory. And I think it's clearly shown that
17 it's two different things, there are access roads
18 and there are primary access routes, and that the
19 draft that we proposed offers to explain each of
20 them and give standards for including both access
21 roads and primary access roads on the inventory.

22 So, that's essentially it. And again,

1 we offer to work with BIA and Federal Lands to
2 come up with whatever is appropriate. But again,
3 we think it is absolutely necessary to include
4 it. So, thank you.

5 MR. KIPP: Thank you for that comment.

6 And again, just to kind of reiterate what Mr.
7 Springer says, any comment that you have
8 pertaining to the proposed facility, existing
9 facility, anything inventory related, we
10 certainly welcome your comment because it is
11 difficult to kind of try and implement the
12 regulations that we're proposing here without
13 tribal input. Because at some point in time, we
14 need a definition of what an access road is, and
15 what is a primary access route, and what's the
16 difference between the two. Because at some
17 point in time, everybody in this room is going to
18 be submitting a primary access facility and we
19 need to have that line in the sand that says this
20 is what the definition is so that everybody
21 understands it. Because that's been very
22 difficult to define access, as a road to somebody

1 in California, or in Maine, or in Wisconsin, in
2 Alaska, and try to treat every tribal entity the
3 same. It is very difficult.

4 The coordinating committee I think has
5 seen that. It is very difficult to ask them to
6 vote and everybody says yes, I understand, we
7 can accept this. Like I said before, it is
8 critical, at least for the inventory portion of
9 the questions that consideration be given and
10 comments be given on this type of thing to help
11 clarify the implementation process. Because at
12 some point in time, my guess is that these
13 regulations will be final, and then we have to
14 implement the final question and the final answer
15 in a way that all the tribes can actually agree
16 upon. And that will be the difficult part of
17 this.

18 But again, 446, the minimum
19 attachments basically is a brand new question.
20 And I believe the intent there is to basically
21 eliminate the letter from Mr. Ragsdale almost
22 seven years ago now. Yes, that's the right time.

1 Mr. Ragsdale put out a letter identifying the
2 minimum attachments for the inventory. This
3 particular question, 446, is basically intended
4 to replace that. And again, that's a series of
5 questions on the TTP facility inventory.

6 The next subsection references
7 environmental and archeological requirements.
8 450 identifies that the TTP environmental and
9 archeological requirements are located with BIA
10 and FHWA websites. And that's going to be
11 important to know which laws apply to
12 environmental, which laws apply to archeological.

13 MR. JAFFE: Sheldon?

14 MR. KIPP: Yes?

15 MR. JAFFE: Matt Jaffe, Sonofsky
16 Chambers. Sheldon, I guess I'm having trouble
17 understanding the rationale that the Pat Ragsdale
18 memorandum, going back to 2006-2007, about
19 minimum attachments is codified in the
20 regulations. But by the same token, BIA and
21 Federal Highway elected to remove the appendices
22 about the design standards and cultural and

1 archeological standards. You made a reference to
2 one of the regulatory provisions that even though
3 you might have a Federal Highway approved TIP,
4 all other requirements have to be satisfied
5 before you can expend these funds.

6 Back in the neg reg committee, it was
7 the goal to have one set of regulations where
8 tribal officials and tribal program officials and
9 BIA regional and Federal Highway officials could
10 go, sort of a one-stop shop to find the answers
11 to program questions. So, can anyone elaborate
12 on how one policy guide makes it into the federal
13 regulations, and then appendices dealing with
14 design standards and cultural and archeological
15 resource requirements are deleted? It doesn't
16 make much sense.

17 MR. GISHI: What it's referencing, and
18 this is a comment that came up at the last couple
19 of meetings. When the, thank you, when we're
20 looking at those appendices that were removed,
21 they were removed to a location of website. And
22 some of them were and some of them were not,

1 okay. We would have preferred that they all stay
2 in the regulation likewise. But the
3 rationalization came back from those people who
4 have responsibility and authority to do this did
5 it.

6 The Ragsdale memo as you put it is in
7 a different ballpark because it is a process that
8 was recommended by the coordinating committee.
9 And then we went through the process of, that's
10 what we continued to use for six or seven years
11 while the inventory was being updated and
12 everybody out there was pretty much compliant and
13 utilizing that process. What it did was it
14 eliminated procedures that the committee felt
15 were not necessary in order to get a road into
16 the inventory. And it made that accountability
17 of other public authorities who were road owners
18 responsible to ensure that they were not pushing
19 the road inventory and all the functions
20 associated with maintenance and construction off
21 on to the tribes unless the tribes wanted to
22 participate in that process.

1 So, that's what was in there. So, the
2 policy process is consistent with what we do in
3 between the regulations when we do policy because
4 we have no other avenue other than to update the
5 regulations at the time. The changes are
6 referenced in there, and the question and the
7 concern that came up in the other two meetings
8 was how do we know that those appendices are not
9 going to change. And that is the question that's
10 out there now.

11 So, that really is one of the areas
12 that we are going to go back and ask, that this
13 is the concern that's come up. And I think that
14 statement has been made several times in
15 Sacramento and in Phoenix and here is how do we
16 know assure that those elements that we feel,
17 that the tribal commenters feel is necessary to
18 have in the regulations, that they will continue
19 to be there when it's under the process that is
20 not regulatory in nature but it's just
21 referencing a list. Does that make sense?

22 MR. JAFFE: LeRoy, I appreciate what

1 you're saying. But by the same token, you've
2 taken what was the work product of negotiated
3 rulemaking ten years ago where there was
4 consensus by both Federal Highway and BIA --

5 MR. GISHI: I haven't. Let me make
6 sure you're clear on that.

7 MR. JAFFE: Okay. All right.

8 MR. GISHI: Yes, please, don't say
9 that. I'm serious.

10 MR. JAFFE: Okay. I understand. The
11 departments have taken what was the work product
12 of negotiated rulemaking and now made it
13 available on website. But that, as you know,
14 under the Indian Self Determination Act,
15 guidelines and unpublished regulations do not
16 carry the force of law that published regulations
17 do. So, the department has taken the Pat
18 Ragsdale policy memo and put it into the
19 regulation. And perhaps that's a good thing to
20 do.

21 But what I'm asking is how can the
22 departments, at the same time, take these lists

1 and take them out of the regulation process. If
2 it's really for the administration convenience of
3 that the lists might change, then you do a notice
4 and comment and you change the regulation. But
5 you don't take what was the work product of the
6 neg reg and just simply say please check, you
7 know, a website and this might change
8 unilaterally as we choose to change it without
9 consulting you. It doesn't make sense from a
10 policy standpoint.

11 MR. GISHI: Okay. And that's exactly
12 the point that was made in Sacramento and Phoenix
13 that you're making, that you pointed out again
14 also. But relative to the policy, it's a policy,
15 it's put in the regulation. And if it
16 overwhelmingly, the minimum attachments and what
17 was put together by the coordinating committee is
18 not acceptable in terms of the public, in terms
19 of it being utilized, then that should be made
20 known also very clearly. Or if it needs to be
21 changed. Much like the recommendation on access
22 roads that are coming in right now.

1 MR. KIPP: Okay. Getting back to 450,
2 it basically identifies what archeological and
3 environmental requirements must the TTP need to
4 begin. It's a new proposed reg basically
5 identifying the website versus what's in the
6 existing reg that actually list them.

7 451 and 452 indicate that TTP funds
8 can be used for compliance in other activities.
9 451 and 452. In 452 it references, it's
10 basically a new, although it's, it's a new
11 question, 452, when can TTP funds be used for
12 archeological and environmental activities? TTP
13 funds can be used in a project's archeological
14 and environmental activities only after the TTP
15 facility is included in the tribe's LRTP and the
16 NTTFI, and the project is identified on an FHWA
17 approved TIP. Again, 452 is basically a brand
18 new question that identifies environmental and
19 archeological actions, reviews. And preparation
20 of those types of documents can only be prepared
21 once a facility is in the LRTP, in the NTTFI, and
22 is on an approved TIP.

1 Basically, a lot of these questions
2 and answers are kind of referencing other
3 questions and answers. But again, 452 is a brand
4 new question pertaining to the environmental and
5 archeological requirements or documentation. So,
6 452, brand new question.

7 Next portion, the design, 454, what
8 design standards are used in the TTP. Basically,
9 that particular question is very similar to the
10 existing regs, 454.

11 455 clarifies what other factors
12 influence the project's designs. 455 basically
13 identifies the design life of a highway, the
14 design life of a bridge. Question and answer
15 very similar to the existing regs.

16 456, 457, states how tribes can
17 request design exceptions in the appeal process
18 if the request is denied. 456 and 457 basically
19 identified, like it says, if you wish to design
20 something in a non-familiar matter not pertaining
21 to something the Federal Highway or the BIA has
22 done in the past, alternate design exceptions.

1 The question and the answer does separate as to
2 whether you're in a Title 1, Title 4, or a
3 program agreement with the BIA versus what you do
4 if you're with Federal Highway, you have a
5 Federal Highway agreement, basically who you
6 request, who approves the ultimate design.

7 Next section of questions and answers,
8 review and approval of plan specifications in
9 essence, 460, 461, 463. What must a project
10 package include, 460. 460, 461, it's really
11 important to kind of get an idea of when people
12 are talking about a project package versus a
13 PS&E. You have probably heard both of those
14 terms before. We have all probably heard about
15 PS&E package, the plans, the specs, and the
16 estimate. That's what that basically refers to.

17 This question and answer just
18 identifies that a project package, that is only
19 the first of several things that need to be done
20 in order for a project package to be considered
21 whole. Your PS&E, your archeological and
22 environmental document. Your right of way

1 easement. That's what we refer to as a project
2 package. It's very important to understand the
3 difference between PS&E and project package.

4 Remember that RF funding that we
5 received three, four years ago? Remember that
6 term that they used? Shovel-ready projects?
7 That's what a project package is. PS&E is done,
8 all your compliance documents are done, your
9 right of way in place, all you need is cash to
10 start the project. But again, project package,
11 very important term in my opinion when we're
12 talking about projects because sometimes you
13 apply for, we used to apply for high priority
14 projects, those type of things, it is important
15 to understand that.

16 463, what if a design deficiency is
17 identified? Yes? Of course.

18 MR. HEALY: John Healy, Fort Belknap.
19 Sheldon, does 460 also include parking lots?

20 MR. KIPP: Yes. Parking lots, if you
21 have a construction project, you have a
22 nationwide project, as long as it's on your TPL,

1 your tribal priority list, and it becomes a
2 project in and of itself, then this whole package
3 applies. Plans, specifications, and estimates
4 for building your parking lot, your environmental
5 and your archeological documents pertaining to
6 the use of the land, and your right of way,
7 whether it's contemporary construction or your
8 long-term road maintenance. Those documents
9 apply, even for parking lots.

10 MR. HEALY: Thank you.

11 MR. KIPP: Okay. Construction and
12 construction monitoring, 470, 471.

13 MR. KELLY: Sheldon?

14 MR. KIPP: Yes?

15 MR. KELLY: Dave Kelly, Oglala Sioux
16 Tribe. Could you explain a little bit more in
17 detail on 170.463? Identifies the actions to be
18 taken if the Secretary identifies a design
19 deficiency?

20 MR. KIPP: Okay. As far as a design
21 deficiency, I want to say that this is very
22 particularly difficult to answer because it does,

1 in my opinion, it does depend on what type of
2 document you have under which you're performing
3 it. If it's a Title 1 document under 638, then
4 the PS&E or the five other packages of delivery,
5 right, we kind of consider it deliverable, it
6 allows us the chance to review it. A program
7 agreement for the BIA and a program agreement for
8 Federal Highway, if the design is actually
9 identified, usually it's after the fact unless
10 the tribe provides the design before they move
11 into the construction phase. Because right now,
12 I don't believe there is a question and answer in
13 these regulations that are being proposed
14 identifying that a tribe must provide the Federal
15 Government a chance to review it.

16 Now, if a design deficiency is
17 identified, as the response identifies,
18 immediately notify the tribe of the design
19 deficiencies and request that the tribe properly
20 resolve the deficiency under the standards in 454
21 that are identified. All it basically says is
22 that if we find something wrong, the onus is

1 still on the tribe to resolve it. And that's the
2 way the question and answer currently reads right
3 now.

4 As far as the implementation of what
5 happens, you know, does the program agreement
6 stop because you designed something wrong?
7 That's a tough question to answer.

8 MR. KELLY: Dave Kelly, Oglala Sioux
9 Tribe. I get the feeling that, you know, even
10 though we're trying to get away from the Big
11 Brother effect when we first went to Federal
12 Highway several years ago, this one statement
13 right here is putting it right back in place. Is
14 that what you're saying?

15 MR. KIPP: No, that's not intended to
16 do that.

17 MR. KELLY: Is that how? We assume
18 the responsibilities of the Secretary?

19 MR. SPARROW: This is Bob Sparrow,
20 Federal Highway. You are, the engineer of record
21 and the tribe are responsible for carrying out
22 the project. But the Federal Government in

1 review of those documents that you provide to us,
2 you're supposed to provide that entire package to
3 Federal Highway or BIA. If we go through it and
4 we identify something that we think is a health
5 or safety issue, we're not the engineer of
6 record. You have an engineer that's an engineer
7 of record, but we need to bring it to your
8 attention. And that's what this is saying.

9 We don't review, we don't do second-
10 level review of the projects. You're carrying
11 out the program as you are with Federal Highway
12 with your consultant who signs the PS&E. He's
13 the engineer of record. But if we see something,
14 it's our responsibility to make sure that you're
15 aware of it and he's aware of it and it gets
16 resolved. That's all this is saying. Okay?

17 MR. KELLY: Yes, sure.

18 MR. SPARROW: Well, no, no, no. If
19 that additional, if it's not being clear, I'm not
20 the engineer of record. All I can tell you, if
21 we've seen something that we think potentially is
22 a health or safety issue, then we need to bring

1 it to your attention.

2 MR. KELLY: Dave Kelly, Oglala Sioux
3 Tribe. Maybe we need to add that one excerpt in
4 there.

5 MR. KIPP: It's already in there. I
6 think as far as the, it does say the Secretaries.
7 It does say the Secretaries have the
8 responsibility to identify health and safety
9 issues. So, if you're a tribe that has a Federal
10 Highway agreement, basically the Secretary of
11 Transportation, Mr. Sparrow's group identified a
12 design deficiency, you still have the oversight
13 responsibility for the actual facility to be
14 constructed in that safe and efficient manner.

15 For the BIA side, if you are in a
16 Title 1 contract or in a Title 12 contract, or
17 you've got a program agreement, a government-to-
18 government agreement, I would think that it would
19 be our responsibility. And I think for myself,
20 regardless of the document that you have, if it
21 is identified as a BIA role, it is very important
22 that they be designed in a safe and efficient

1 manner.

2 But I think as far as a design
3 deficiency, it's got to be purely technical in
4 design. I mean if it goes back into something
5 that's going to fail or something that's going to
6 cause a health and safety risk.

7 MR. GARRIGAN: Yes, Jim Garrigan,
8 Tribal Transportation Consultant. Where would
9 you identify a design deficiency when the plans
10 are not forwarded to the Federal Government under
11 the Title 1? Or would it be out on --

12 MR. GISHI: LeRoy Gishi, BIA. And
13 again, it all goes back to the idea of where is
14 the, what type of agreement as Sheldon said.
15 Obviously, in a Title 1 and only Title 1 Subpart
16 J where the deliverable is the plans, then that
17 part of the approval process can be written into
18 the agreement, and that's generally what happens.
19 But in self governance, in the BIA agreements, in
20 the Federal Highway agreements, if you look back
21 at the statement that's identified in 463, there
22 is a process there that says when you're taking

1 on, when a tribe is taking on that work, you're
2 certifying. When you're certifying, it should be
3 to answer the questions that what you're doing is
4 you're hiring a licensed professional engineer to
5 do the work and you are fully responsible for it.

6 And how do you identify the
7 deficiency? Well, that's what we're saying.
8 You're taking on that role. It only comes to our
9 attention if someone, and sometimes it's someone
10 in the public or someone else says there's a
11 problem with that bridge or there's a problem
12 with that road. Then of course the first thing
13 you do is you say bring it to the attention of
14 the tribe and then you go from there.

15 And in most cases, it's a
16 misunderstanding or someone is interpreting the
17 requirements completely differently and the tribe
18 is doing the work that it's supposed to be doing.
19 Very rarely do you have a situation, but that
20 would be where you would catch this kind of
21 things is through the review process, the program
22 reviews with the tribe or if it comes to the

1 attention of the BIA and the tribe through some
2 other means. But obviously, the way their
3 contracts are written, there is no longer that
4 second-level review process. There is not that
5 looking over the shoulder on every process
6 because the agreements allow for the complete
7 management of the program through including the
8 design phase in a lot of these contracts and
9 agreements.

10 MR. GARRIGAN: Yes, Jim Garrigan
11 again. Yes, that's why the tribes are required
12 to have professional engineers designing these
13 projects because it's, they're not going to --
14 you know, and their license is out there, it
15 could be revoked if someone gets killed also.

16 MR. GISHI: Exactly.

17 MR. GARRIGAN: Thank you.

18 MR. KIPP: One last comment about the
19 review and approval of plans, basically under
20 Question 460, the proposed reg basically like Mr.
21 Gishi said, they do eliminate the second-level
22 review requirement of the existing regulations.

1 If you read through the existing regulations, it
2 does identify that there must be a second-level
3 review performed. But we all know that SAFETEA-
4 LU, that came into effect within months after
5 these existing regs being finalized back in 2004.
6 SAFETEA-LU basically eliminated the second-level
7 of the process. So, you'll notice that in 460,
8 that it does eliminate the second-level review of
9 engineer in here so there is only a requirement
10 for a single engineer to review it, sign it,
11 stamp it, certify that the health and safety
12 standards are basically in place and the project
13 is pretty much ready to roll.

14 Construction and construction
15 monitoring, which construction standards must be
16 used, 470. 471, how are projects administered?
17 472, what construction records must tribes and
18 BIA keep? The questions and answers here are
19 very similar to what's in the existing regs,
20 although there is a table for the documentation
21 as far as tribe and BIA who basically has a
22 responsibility of what document do they keep in

1 place, what construction records must a tribe and
2 BIA keep. There's a table in the actual reg
3 itself to be reviewed and commented on.

4 473 provides information on when a
5 project is considered complete and how and by who
6 the project closeout is conducted. 473. The
7 actual question, when is a project complete?
8 Those particular answers in there, the subsets in
9 there are again very similar questions, are
10 already in the existing regs for construction and
11 construction monitoring.

12 The next series of questions pertains
13 to management systems. 502 identifies the
14 requirement for national management system, and
15 also as well as what the tribes can use if it
16 desired to have its own management systems in
17 place. 502, the actual question, are nationwide
18 management systems required for the TTP? The
19 answer is basically identified as the Secretaries
20 to the best of their ability will encourage the
21 implementation of some sort of management system
22 for the TTP program that the tribes are basically

1 running. It allows for a tribe to basically have
2 a software system to manage its own systems.

3 Bridge program, questions 510 to 514,
4 identifies the TTP bridge program as the source
5 of funding for bridge work, where additional
6 regulations can be found, all funds are made
7 available to tribes, and also updates the bridge
8 inspection requirements that had been set in
9 place by MAP-21.

10 Again, 510, what funds are available
11 to address bridge activities? Funds are made
12 available to 23 USC 202(d) to maintain a
13 nationwide priority of improving deficient and
14 eligible bridges.

15 511, what activities are eligible for
16 Tribal Transportation Facility Bridge funds? For
17 that particular question and answer, you'll
18 notice that there is a change of the name for the
19 IRR bridge program, it is now called the Tribal
20 Transportation Facility Bridge Program. And
21 those can be found, those regulations for that
22 particular bridge program can be found in 23 CFR

1 Part 661. So, again another acronym change, IRR
2 Bridge Program to the TTP Bridge Program. But
3 just be reminded that those regulations for the
4 TTP Bridge Program are in 23 CFR, Department of
5 Transportation CFR.

6 512, how will a Tribal Transportation
7 Facility Bridge funds be made available for the
8 tribes? Again, that basic answer is basically
9 referencing what type of document can you put the
10 bridge funds into. Title 1 contract, Title 4
11 contract, G2G agreement with the BIA, Federal
12 Highway agreement with Federal Highway, or
13 another agreement under the Self Determination
14 Act can also be allowed.

15 513, when and how are bridge
16 inspections performed? All bridges identified in
17 NTTFI must be inspected under 23 USC 144. Again,
18 that particular question basically identifies
19 that all bridges in the NTTFI which now includes
20 the tribal bridges, tribal bridges must now
21 follow the inspection standards as far as being
22 inspected, recorded, submitted to the database

1 that Federal Highway maintains.

2 Last question there, 514, who reviews
3 bridge inspection reports? The person
4 responsible for the bridge inspection team must
5 send a copy to the BIADOT as far as the review
6 and reports for quality assurance. And then you
7 take those documents, create another text file
8 that is basically submitted to Federal Highway,
9 to the person that actually maintains the
10 National Bridge Inventory.

11 But again, as far as when we go
12 through the bridge program questions, these are
13 fairly new questions for the bridge program, so
14 for 510 to 514.

15 Appendices A and B to Subpart D have
16 been removed. That information again can be
17 found in the website for both BIA and FHWA. But
18 again, Appendix A and Appendix B in the existing
19 regs will now reside on the two websites, BIA and
20 Federal Highway.

21 And I think that concludes, if there's
22 any other questions on the last portion that

1 we're talking about? If there isn't, that's
2 Subpart D.

3 MR. FISHER: I had a question.

4 MR. KIPP: Yes?

5 MR. FISHER: Conrad Fisher, Northern
6 Cheyenne Tribe. I'm relatively new at this. So,
7 under 170.460, what must a project package
8 include, part of it is the required
9 environmental, archeological and cultural
10 clearance, and then, which would establish your
11 guidelines to approve the package and
12 subsequently start the project. But under
13 construction and construction monitoring, under
14 470, if an archeological clearance is established
15 and the project moves forward, and there is
16 evidence that there are subsurface cultural
17 material and that the project needs monitoring,
18 where would that fall under wherein there may be
19 some time during that project an event that would
20 stop the project to assess the cultural material
21 or to realign the road? Where in these policies
22 would that be addressed?

1 MR. KIPP: Okay. Well, what you're
2 basically talking about is basically I want to
3 say routine for the design process. Because when
4 you do an archeological assessment, you're
5 basically doing a surface archeological
6 assessment. You're not two feet down, you're not
7 ten feet down. But most of those archeological
8 documents are prepared in such a way that
9 identifies that the archeological survey was done
10 on the surface. And there's always, or usually
11 is some sort of identification that, should
12 construction commence and the movement of dirt be
13 moved to the point where you run into an
14 archeological assessment, that that basically
15 stops the project. It stops the construction
16 phase for further analysis and reassessment for
17 archeological purposes.

18 And in some cases, that can actually
19 stop a project for a long period of time,
20 depending on what they run into. But again, that
21 is a part of the actual archeological assessment
22 and it's basically applicable from what I

1 understand to be for all construction projects.
2 Because in the design phase, you can only see the
3 surface.

4 MR. FISHER: Exactly.

5 MR. KIPP: And that's what the
6 archeological assessment survey basically does is
7 that there's always some sort of, for bridges and
8 everything, that during construction, should an
9 activity be identified to the point where an
10 archeological assessment would have to be re-
11 performed based off of what has been unearthed,
12 at that point in time that's when that usually
13 happens.

14 MR. FISHER: Okay. So, in reference
15 to monitoring, it doesn't take into consideration
16 archeological monitoring. For example, if you're
17 doing subsurface construction, oftentimes tribal
18 preservation officers or even an archeological
19 firm, because of the density of archeological
20 resources, may in fact want to have a monitor
21 during that construction phase so that they can
22 properly assess the effects, adverse effects of

1 that construction should they run into cultural
2 material. So, again, would that be something in
3 the package or would it come under construction
4 monitoring? Because you could clear a project
5 for cultural clearance, but at the same time
6 there may be a need to monitor it.

7 MR. KIPP: Yes, it goes back, like I
8 said, hopefully this answers your question, but
9 again it goes back to the archeological
10 assessment. Coming out a little bit out of
11 Albuquerque, I'm quite familiar with the
12 southwest region and the Navajo region. And a
13 lot of their archeological documents, they will
14 identify it, based on the surface assessment that
15 they recommend that during the construction
16 process, that not only are project inspectors for
17 the road construction be out there, but an
18 archeologist of a certain level be on site during
19 construction so that if something is unearthed,
20 they can immediately identify what processes, per
21 the archeological requirements in the assessment,
22 must need to be done.

1 And they are actually there to
2 actually verify that, yes, we have a serious
3 problem here, because most of the time, like I
4 said, in the southwest, they do have
5 archeological people as well as the road
6 construction people onsite because they run into
7 fire pits, underground, all the time. And so,
8 when they start unearthing it, not only, like I
9 said before, is there road construction
10 inspectors there, basically some sort of
11 representative from the archeological office is
12 also there.

13 MR. FERRIS: This is Kade Ferris from
14 Red Lake. Yes, I think when you're looking at an
15 archeological issue like that, I mean if you're
16 looking at the surface, you come back with --
17 affected, you can still write in the
18 recommendation section of the archeological
19 report that you want construction monitoring in
20 specific location. It's actually written in the
21 report. It wouldn't be something, I don't think
22 you'd put it in the construction monitoring, it's

1 something you'd definitely put in the initial
2 package as part of the archeological report in
3 this TIP, and you know that that's something that
4 you could typically make that recommendation and
5 get it incorporated in there and make sure it's
6 part of the package.

7 MR. KELLY: I have a question. Dave
8 Kelly, Oglala Sioux Tribe. I want to tie in to
9 both gentlemen's comment there. Just recently,
10 and I don't know how we have addressed this in
11 the past, we've really never dealt with it, and
12 it relates to one of our grants. We were awarded
13 TIGER grant. But unfortunately, that road
14 actually falls within former Badlands Bombing
15 Range. And to get clearance, we're dealing with
16 another federal agency that whenever they came
17 and imploded or exploded the ordinances that were
18 out there, they cleared almost everything other
19 than the road.

20 So, this is one of the issues that we
21 might face if we can't get any clearance. These
22 folks are actually asking us now to come back and

1 pay for their onsite exploded ordnance package
2 which I foresee is a problem. Because when it
3 relates to this grant, we didn't know, we assumed
4 the road was clear because I live in that area.
5 I've known the road for 40 plus years, but I've
6 never come across the scenario where they cleared
7 everything outside the right-of-way boundaries
8 but nothing within the right-of-way boundaries.

9 So, this is a scenario that, you know,
10 eventually somebody else is going to run into.
11 And we've never really dealt with it before.

12 MR. CAULUM: So, Andy Caulum,
13 Solicitors Office. You're telling me that you've
14 been driving on this road, they cleared the
15 possible unexploded ordnance that they're aware
16 of outside the right of way but you're driving on
17 the road where now they say if you're going to
18 reconstruct it you should let us know because
19 there might be a bomb under the road and we need
20 to come in and charge you to determine whether
21 it's there?

22 MR. KELLY: Yes.

1 MR. CAULUM: That seems a little
2 inconsistent. All right. That's, I'm not quite
3 sure you can capture that in regulations, but
4 there might be an inter-agency discussion here.
5 It seems a little inconsistent that the tribes
6 should have to pay, and this is not an official
7 position of the national government at this
8 point, but it seems a little inconsistent that
9 the tribes should have to pay for that. And I'm
10 assuming it was the Defense Department's bombs
11 that may have been dropped within that right of
12 way.

13 MR. SPARROW: I'm sorry, that's the
14 first I've heard of this.

15 MR. CAULUM: I think Mr. Sparrow, it's
16 the first he's heard of it. And Mr. Gishi, have
17 you ever heard of it?

18 MR. GISHI: Yes. Oh, yes.

19 MR. CAULUM: All right. That closes
20 Subpart D. This is Andy Caulum. We're on
21 Subpart E, Service Delivery for the Tribal
22 Transportation Program. The changes in these

1 areas are fairly modest, I would say, but
2 obviously we always appreciate and look for
3 comments on this. Mostly, what you'll find with
4 service delivery, they're reflecting the way the
5 program is being run today versus in 2004.

6 The funding process at 170.600 has
7 been updated to reflect how the tribes are
8 notified of annual funding amounts as well as the
9 time frame by which those funds must be made
10 available to tribes. That 602 is modified to
11 identify that under existing statutes no
12 additional funding is available to tribes for
13 unperceived construction costs.

14 One thing that I hadn't discussed
15 early in the introduction was, we'll get into
16 maybe a little bit of this after the
17 consultation, but something to keep in mind as we
18 move forward with going to our final rule is that
19 if Congress does in fact pass a new
20 transportation re-authorization, that it could
21 affect certain parts of the rule. You know, as
22 you all know, I think you've been keeping track

1 of the various proposals that have come through
2 over the course of the last year or so to re-
3 authorize the Surface Transportation Act. There
4 haven't been any really significant changes that
5 have been proposed to the Travel Transportation
6 Program, but that of course can always change,
7 especially now we have a change in the control in
8 the statute.

9 Miscellaneous provisions in 170.605
10 describes when force account methods may be used
11 in the TTP. That I think has perhaps been a
12 little bit more of an emphasis now with the
13 advent of the Tribal Transportation Program
14 agreements and in some cases tribes having their
15 own roads departments doing the work. They're
16 doing, you know, doing a lot more of the work
17 maybe than they have in the past, especially
18 before 2004.

19 170.606 identifies legislation and
20 procurement requirements of the TTP. There
21 weren't any significant changes there. And
22 170.607 to 609 describe use of funds for contract

1 support costs in startup activities.

2 Subpart E, there are some changes in
3 170.610. It identifies the functions that tribes
4 may assume in their agreements with BIA and
5 Federal Highway. 170.611 identifies the special
6 provisions that apply to ISDEAA contracts. There
7 weren't any significant changes there. 170.612
8 describes that non-contractible activities are
9 funded out of the funds identified in 23 USC 86
10 which is the program management and oversight
11 set-aside and can be only used by BIA and Federal
12 Highway. It identifies that each of these can be
13 found in the appendix to the Subpart E.

14 MR. JAFFE: Andy?

15 MR. CAULUM: Yes?

16 MR. JAFFE: Matt Jaffe, Sonofsky
17 Chambers. The proposed regulations suggest that
18 the agencies have made a policy change from
19 existing practice that the 6 percent funds are
20 actually two components. There is program
21 management and oversight, and there is project-
22 related administrative expenses. In the past, or

1 in current practice, when tribes contract
2 directly with Federal Highway Administration,
3 Federal Highway takes part of that 6 percent and
4 then shares some amount, a modest amount with the
5 tribes. Has the proposed rule revised that to in
6 essence shield that?

7 MR. SPARROW: It was left out. That's
8 the same, we've received this comment.

9 MR. JAFFE: Okay.

10 MR. SPARROW: That was accidentally
11 left out. It needs to go in there.

12 MR. JAFFE: Okay, thank you.

13 MR. CAULUM: 170.614 update reflects
14 that tribes may receive partial funding as that
15 funding becomes available to Federal Highway and
16 BIA. As many of you are well aware, we've
17 operated basically almost since the time I've
18 been involved with the Federal Government going
19 back to 2007 on continuing resolutions or partial
20 or short authorizations. And what happens is
21 even though Congress has authorized X amount of
22 dollars for the Service Transportation Act, the

1 amount that can be made available to tribes is
2 related to the continuing resolution.

3 So, and for example right now, Bob,
4 what is it? Are we at, it's always a numerator
5 over denominator. What are we at for the current
6 year?

7 MR. SPARROW: How many days?

8 MR. CAULUM: How many days?

9 MR. SPARROW: 243.

10 MR. CAULUM: So, we're at 243/365ths.

11 MR. SPARROW: Right.

12 MR. CAULUM: Funding available. So
13 that's --

14 MR. SPARROW: It's two-thirds.

15 MR. CAULUM: If you're on a program
16 agreement or whatever it might be, the number
17 that you're being notified now has become
18 available to you is 243/365ths of your annual TTP
19 tribal share.

20 MR. SPARROW: Two-thirds.

21 MR. CAULUM: Two-thirds. 170.615 to
22 18, updates the ability to get advance payments,

1 receiving additional funds if they become
2 available to the Tribal Transportation Program on
3 a nationwide basis, contingency and savings to
4 align with the new statutes. Yes, sir?

5 MR. BRONCHO: Anthony Broncho,
6 Shoshone-Bannock Tribe. Back on the next slide,
7 on the 170.607 and 609?

8 MR. CAULUM: Yes?

9 MR. BRONCHO: On the contract support
10 costs. I know we've put in, I think it's been
11 like three years now since, I guess that's in
12 litigation right now. Our award project cost was
13 approved by our regional office, it got to D.C.
14 and it was denied.

15 MR. CAULUM: Is this for the road
16 maintenance program or for the Travel
17 Transportation Program?

18 MR. BRONCHO: Road maintenance.

19 MR. CAULUM: Okay. That would be
20 under a different -- line. So, obviously that's
21 something that, that comes up from the
22 appropriation under 25, under the Interior's

1 appropriations as opposed to Federal Highway.
2 So, there's differences in how those are
3 addressed. But here we have updated that in 607
4 and 609, if the tribe is going to start up the
5 Tribal Transportation Program.

6 Okay. Contracts and I think, I didn't
7 skip any, did I? Contracts and agreements,
8 170.619, identifies when tribal preference and
9 Indian preference apply to the TTP. There
10 weren't any changes there except for adding the
11 program agreements to the reference.

12 620 identifies the reimbursable and
13 other agreements with state or local governments
14 for a TTP project may include Indian Self
15 Determination Acts, Indian preference provisions.
16 And I'm going to briefly touch on this, we
17 haven't done it a lot recently, but in part I
18 think because tribes have been moving quite a bit
19 to the program agreements with Federal Highway
20 and BIA, but when I first came in there were,
21 about seven and a half years ago now, there were
22 some tribes that were still using Title 1 but

1 also had pretty good cooperative relationships
2 with their local governments. I don't think, I
3 don't know if Ho-Chunk has done this, but I know
4 that that tribe in particular has some good
5 relationships with their local governments.

6 And as the president alluded to, the
7 agreements usually are titled as a cooperative
8 agreement. In fact, the way that they work in
9 practice is they're a reimbursable agreement
10 where, say for example, a tribe and a township
11 have a road that might, you know, go through the
12 tribal lands and they town for whatever reason
13 has the capability to pay with the tribe, would
14 like to contribute something to it. And so,
15 we've worked on agreements in those situations
16 where a tribe can do what amounts to a
17 reimbursable agreement with the township. And we
18 characterize them as cooperative agreements
19 because really in one way that's what they are.

20 However, there's a little bit of a
21 confusion, and Matt is looking at me like why are
22 you doing it that way? Because he's thinking of

1 the Grants and Cooperative Agreements Act I
2 suspect. And some of my colleagues thought about
3 this during the Recovery Act phase where we had
4 these cooperative agreements, and I got some
5 push-back from my colleagues saying, well, what's
6 the tribe doing? You know, people have, both
7 agencies have to be doing things. In fact, we
8 view it as a way to say, listen, the local
9 government and the tribe are working together.
10 So, we have addressed, we have clarified some of
11 that as well.

12 621, no significant change other than
13 to add Federal Highway and BIA Tribal
14 Transportation Program agreements. 622, no
15 significant changes. 23 through 25, no
16 significant changes other than for clarification
17 purposes. And 626 identifies how a tribe can
18 request a waiver in the regulation. And then in
19 the appendix, there's a list of non-contractible
20 activities, in other words, activities that only
21 the, or what amounts to inherently federal
22 functions, and there are no significant changes

1 there.

2 Subpart F, program oversight and
3 accountability. 170.700 describes what a TTP
4 stewardship plan and national business plan is.
5 170.701 clarifies that a tribal or BIA memorandum
6 of understanding may be used to identify work
7 that the BIA will carry out at the tribe's
8 request. That is related to direct service
9 rather than sort of the old days where the road
10 engineer would say, oh, gee, look at these roads,
11 I want to get these projects done now. Instead,
12 the tribe and the road engineer -- and make that
13 decision together. And anyway the tribe will be
14 directing this is what we want you to do, here's
15 the funds that we have available for this year.

16 170.702 identifies that the Secretary
17 will review and monitor the performance of all
18 Tribal Transportation Program activities.

19 170.703 and 704 describe what reviews the
20 Secretaries conduct and how improvements are
21 identified in activity. Yes?

22 MR. WRIGHT: Sherman Wright, Rosebud

1 Sioux Tribe. On 703, it's not even mandated, and
2 even if the word is must, it doesn't mean shall.
3 The reason I'm saying that, the standard with you
4 before and the Federal Highways agreement never
5 went out through all the regions. We never got a
6 letter to go to Aberdeen and -- BIA road. We
7 were never given a -- southwest where everybody -
8 - so, if this says, if it's not mandated, how can
9 you enforce it because we're the ones -- wasn't
10 even enforced.

11 And then one other thing, too. You
12 talked about 638 tribes that are contracting, but
13 what about the -- you know, this is the same
14 thing as -- BIA regional -- the reason I'm saying
15 that is because our Federal Highway office is in
16 South Dakota. We don't really know who's the
17 main man, what he looks like. So, why not add in
18 shall, add him to the picture of -- use this word
19 shall.

20 MR. CAULUM: Thank you.

21 MR. JAFFE: I have another one, Andy.

22 Matt Jaffe, Sonofsky Chambers. I think Mr.

1 Wright makes a good. And our coalition of
2 clients would recommend that 170.703 be clarified
3 to reflect the fact that the only way program
4 oversight of a project is going to take place is
5 pursuant to the terms of the program agreement or
6 the contracts under the Self Determination Act.
7 And as written, it seems as if there's a
8 disconnect between 703 and the program reviews
9 that the Secretaries conduct, and the fact that
10 the only reason the tribes are carrying out the
11 project or program is because they've contracted
12 or have a program agreement.

13 But if this is qualified and said
14 "subject to the terms of the program agreement or
15 contracts negotiated between the agencies and the
16 tribes, BIADOT and Federal Highway conduct formal
17 program reviews," that would make sense and it
18 would be subject to the terms of those written
19 agreements.

20 MR. CAULUM: Thank you. Comments on
21 F?

22 (No response.)

1 MR. GISHI: We're now getting into
2 Subpart G and H. And these particular subparts
3 were also submitted to be changed. And as we
4 begin to look at kind of what they are in terms
5 of programs that were, in the case of Subpart H,
6 we're talking about programs which were just
7 referenced in the regulation and comments were
8 made on that. The maintenance, it's important to
9 note that road maintenance in particular that
10 we're talking about here in Subpart G is road
11 maintenance as a slice of the Tribal
12 Transportation Program.

13 The advantage of road maintenance in
14 terms of the activities associated with it is it
15 applies because TTP use BIA roads, the same type
16 of maintenance activities that exist in the BIA
17 program are specifically identified here. And
18 any addition to that would be specific to that
19 public authority in terms of, if it's a tribe
20 within the tribe, and if it's not, in the state,
21 and you're intending to use these funds to
22 maintain those roads, then having some sort of

1 agreement identifying what those activities are
2 and what the expectations are is important. And
3 of course in that particular case, that list not
4 only becomes an important part of that negotiated
5 agreement but also if there are things that are
6 outside of it, they need to be brought forward as
7 either a new use or a negotiated process under
8 the combined program of whoever that public
9 authority is and its accounting to local
10 government, the state, and the tribe and/or the
11 BIA.

12 And I say that because most state and
13 local governments do not treat, for instance,
14 road sealing as an eligible, in terms of, they
15 don't consider it a construction activity. We
16 don't either, it's a preventive maintenance
17 activity. But when it comes to the requirements
18 of how we view it, how it's being regulated, it
19 fits into, from the terms of a funding
20 standpoint, as road sealing and road maintenance
21 but it does not fall under the requirements of
22 the funds in particular. And that would be what

1 we're referring to here.

2 A big part here, as I mentioned, it
3 removes reference to the BIA road maintenance
4 program. But in terms of the activities
5 associated with maintenance, they're in as
6 identified in one of the appendices. In general,
7 eligibility items are in the body of the reg.
8 The specific activities are in the appendices
9 that is referenced in the BIA website in
10 particular. It used to be in the regulation and
11 that's where it's been moved.

12 And there's been comments made that
13 why can't we bring those back in through the
14 process earlier. And that may be the, at least
15 some of those other references in the appendices,
16 and that may be the process that we may receive
17 comments on that also.

18 800 identifies the funding available,
19 specifically under that process. It identifies
20 that the road maintenance program under the TTP,
21 that it is, where it's identified, it references
22 the statute where it allows that. And then the

1 criteria is that 25 percent of the funds that you
2 receive as part of your tribal shares can be used
3 for road maintenance or \$500,000, whichever is
4 greater.

5 And as was mentioned early in the
6 introduction this morning, that change from pre-
7 SAFETEA-LU, it changed with SAFETEA-LU, and it
8 even changed more with MAP-21. The provision for
9 \$500,000, whichever is greater, was not in the
10 law prior to this, to the 2013 MAP-21. And of
11 course, as an activity, it needs to be included
12 on the TIP as an eligible expenditure and
13 identify the kind of, as Sheldon described it, it
14 can be put in there as road maintenance in
15 general and it would identify it as such.

16 We've got a comment/question over
17 here?

18 MR. KELLY: Just a comment. Dave
19 Kelly, Oglala Sioux Tribe again. For a long
20 time, we've always contested, you know, taking
21 our construction dollars to supplement another
22 federal program which is road maintenance. But

1 in the long run, I think we need to look at road
2 maintenance, keep an eye on it, and possibly come
3 up with another reg that will identify road
4 maintenance activities as to bring forth positive
5 reporting requirements. Because if we go back
6 and look at the budget justification, road
7 maintenance is always, you know, no results
8 demonstrated. We've seen that over and over and
9 over through the feedbacks.

10 What we do here in the Great Plans
11 Region is we've got a thing called a deferred
12 maintenance report which is kind of a localized
13 standard. And Mr. Gishi can probably speak on
14 that a little bit more. But it's a good
15 reporting requirement. And I think some of that
16 nature should be applied nationwide so that we
17 can provide, you know, Congress and -- folks an
18 accurate detailing of how our money is spent
19 through road maintenance.

20 MR. GISHI: Thank you. As a matter of
21 fact, the coordinating committee in their
22 November meeting, the representatives from the

1 coordinating committee put that on the agenda for
2 their upcoming meeting in the latter part of
3 February or March, it might be, it's probably
4 going to be March now, as specifically an issue
5 that they wanted to take a look at, developing
6 and discussing standards for reporting primarily
7 for that purpose, what you described. It helps
8 the process of the budgeting. It helps continue
9 to put some standards together to allow for some
10 sort of reporting, not only to within the regions
11 themselves, certainly at the tribal level, but
12 also on the national level, to have a consistent
13 way of being able to report that. Thank you.

14 Yes?

15 MR. SMITH: I don't have a question to
16 ask but I do have a comment.

17 MR. SPARROW: We welcome those, too.

18 MR. SMITH: John Smith for the record,
19 with the Shoshone-Arapaho Tribes Transportation.
20 After the meeting in -- from Alaska and Great
21 Plains, Tribal Transportation Association in
22 Rocky Mountain, region tribal leaders, and the

1 large land-based tribes had an issue and I
2 testified before the committee, the one in
3 Billings. And LeRoy was also there and -- road
4 maintenance, how it's, the condition of its
5 funding and the low level funding for a long
6 period of time. But it seemed to help out
7 through the maintenance giving a little
8 improvement, advanced commitment from the
9 committee that they would be providing additional
10 funds for road maintenance.

11 MR. GISHI: Yes. That's my
12 understanding also, John, thank you.

13 As we go through, one of the things
14 that the regs also continue to state is that
15 maintenance funds in terms of, it restates what's
16 in the statute, that the road maintenance --
17 associated with the BIA program, where the BIA is
18 still response, the Secretary is still
19 responsible for requesting funding for purposes
20 of maintaining the roads, and that the Secretary
21 of the Interior shall ensure that funds are made
22 available under the program for maintenance of

1 tribal transportation facilities for each year
2 and make sure that it's supplementary to and not
3 in lieu of. Basically, that's to make sure that
4 the, as Dave indicated, the general stance has
5 always been, you know, there needs to be road
6 maintenance dollars for road maintenance
7 activities, and construction dollars need to be
8 concentrated on construction. To the benefit of
9 some tribes being able to utilize the limited
10 funds they have, doing heavy maintenance has also
11 been recognized as part of the process as these
12 new changes under MAP-21 have taken place.

13 801, can maintenance funds be used to
14 improve tribal transportation facilities? It
15 clarifies this that maintenance funds cannot be
16 used for improvements. Primarily, improvements
17 are the requirements which we spoke of earlier
18 that require a project package. Generally, it's
19 not only for the protection of the project
20 itself, the environment, but also the
21 responsibilities that are out there associated
22 with public authority that improvements have to

1 follow the criteria of the road construction
2 process, what's in that project package, whereas
3 road maintenance in terms of itself is a
4 maintenance activity. And granted, there are
5 certain provisions that have to take place and
6 still have to be cleared obviously with the
7 public authority, the landowner who has
8 jurisdiction over that, but also it doesn't go to
9 the extent because you're doing routine
10 maintenance from that standpoint. But it is not
11 eligible to be used to do anything that results
12 in a higher road classification capacity or
13 standard.

14 802 verifies that tribes can carry out
15 maintenance activities and just basically talks
16 about what mechanisms are out there for tribes to
17 enter into agreements so they can perform road
18 maintenance. And it lists those, Title 1, Title
19 4, BIA agreements, Federal Highway agreements as
20 those being eligible.

21 170.803 identifies at what standards
22 tribal transportation facilities must be

1 maintained subject to funding availability.
2 Again, this is, we're talking about roads with
3 ownerships that are in, basically what's
4 identified as the TTP, what's in the NTTFI, the
5 National Tribal Transportation Facility
6 Inventory, and the use of these funds. If it's
7 funds that are being provided under an agreement
8 with another entity, obviously they may have
9 requirements. But if you're utilizing the funds
10 out of the TTP program and to supplement that or
11 obviously to help out under an agreement, then it
12 must follow that criteria.

13 And that criteria is identified in
14 terms of the websites that are there, the program
15 guidance on where those standards are identified.
16 And a tribe could have standards. Part of the
17 process is if there's a tribal transportation
18 department, you can have standards that may be a
19 modification of the local standards, a
20 combination of state standards. And if those are
21 approved, then those are certainly eligible also.
22 Other state, federal or local maintenance

1 standards can also be considered and approved, or
2 eligible for approval in the process.

3 804 describes the actions that can be
4 taken if maintenance funding is deemed
5 inadequate. This was put into the regulations
6 through the rulemaking committee back in 2004
7 primarily for the purpose of making sure that
8 those roads which were not up to any particular
9 standard that impacted tribal communities and
10 lands that were under the ownership or
11 responsibility of someone else, if that is the
12 case and these roads are not being maintained,
13 then they need to be reported as it states in
14 Title 23 in the Chapter 1 portion to the
15 Secretary of Transportation as such. And then of
16 course the result of that is the affected tribe
17 will be notified based on that. And the whole
18 idea is to just bring it to the attention of
19 those individuals that are out there that those
20 roads are not being maintained.

21 805 identifies the BIA and FHWA
22 websites where tribes can find the list of

1 eligible maintenance activities. That's
2 basically again what we're talking that lists
3 those similar to what's in 803, the websites
4 where those are identified. And of course, we
5 know that we got some comments in Sacramento and
6 Phoenix that they would like to see those moved
7 back into the agreement. I think we've heard
8 that also here in some comments.

9 Any questions on Subpart G?

10 MR. JAFFE: Matt Jaffe, Sonofsky
11 Chambers. LeRoy, we certainly were pleased to
12 see that the proposed regulations define the term
13 "asset management". And that certainly tied to
14 preventive maintenance and life cycle cost
15 analyses. But when we looked at Subpart G as
16 revised by the agencies, it seems that some of
17 the provisions were removed that should remain in
18 there. And what I'm referring to specifically is
19 current regulation 170.806 and 170.807. And that
20 defines the Transportation Facilities Maintenance
21 Management System.

22 And if asset management is key and

1 extending the useful life of a route or
2 transportation facility is the goal, which it
3 should be for everybody, it seems that there
4 should be maintenance management systems put in
5 place. And those regulations that were included
6 in the 2004 neg reg rule should remain in this
7 regulation, because it all goes to asset
8 management. And that's how, with the limited
9 funding that tribes get which is something that
10 we've all sort of danced around but not addressed
11 specifically, maintenance is critical. And it
12 doesn't make sense from a policy standpoint why
13 current 806 and 807 were removed from the
14 proposed regulation.

15 MR. GISHI: Okay. And to answer your
16 question there, anything that primary, that NTTFM
17 or whatever it was, MS, was put in there
18 primarily for the BIA program. When they took
19 the BIA program out of it, that's why. But your
20 point is well taken, as Dave indicated earlier,
21 having a process that would look at asset
22 management, that would look at performance

1 measures as a way to gauge and re-prioritize not
2 only budgets but also work associated with. And
3 that's essentially what the coordinating
4 committee is looking at, the whole maintenance
5 concept and idea of how to make that better.

6 Any other questions? If not, we'll go
7 to the last subpart in the regulations which is
8 H, Miscellaneous Provisions. Previous to this
9 that was included in the subpart was all the
10 material was for reference only. And this has
11 been removed including, and specifically on how
12 to address at least from the standpoint of who to
13 talk to, what initially to do, what to be aware
14 of, under the Hazardous and Nuclear Waste
15 Transportation. It was not there to be a
16 complete total process of addressing it, but it
17 was there to give people direction and a way to
18 head off a thing if they had something that came
19 up.

20 And as was brought up, it's part of
21 the negotiated rulemaking. And that of course
22 was removed. It was submitted with it in there.

1 It was removed as areas outside of the material.

2 Emergency relief. Emergency relief is
3 a program that addresses disasters. Someone had
4 brought up earlier this morning, we talked about
5 are there any provisions that address disasters.
6 The emergency relief program is part of Chapter 1
7 which is a program that is funded annually under
8 the annual DOI appropriations. And a portion of
9 that is made available to Federal Lands, or we'll
10 call it federally owned roads. BIA roads and
11 tribal roads fit under that category.

12 Again, they just issued in October I
13 believe, or November, a new manual on ERFO, it's
14 out there based on the provisions and how to get
15 the program to work. It's downloadable on the
16 website. It's out there. But again, the reason
17 for that was it's not a program that's funded
18 specifically under the TTP program. Although it
19 is an eligible activity in terms of it can be
20 included in the agreements, as mentioned this
21 morning, it can be included in agreements that
22 are, where funds are provided through Federal

1 Highways.

2 Reporting requirements and Indian
3 preference is pretty straightforward in terms of
4 what information on the projects must be
5 provided. And if we get a request particularly
6 on status of projects under direct service, that
7 the tribes will be provided an update on the
8 projects as to what that is. It's basically a
9 follow-up. It continues to be a portion that was
10 written in there as part of the rulemaking
11 process.

12 911 through 917, it provides
13 information on Indian preference. This is pretty
14 much, no significant changes here in terms of
15 what was previously in the regulation. But it
16 updates the current statutes and program
17 references that are in there, and particularly,
18 if they moved things around under MAP-21 and
19 SAFETEA-LU.

20 919, excuse me, 918, excuse me, well,
21 this talks about, this is where the information
22 collection aspects of what we talk about, this is

1 two parts, that there are, specifically what
2 applies to the Secretaries in terms of data
3 collection for the TTP program. Previously,
4 there was, obviously the road inventory was
5 almost to the extent of being mandatory in order
6 to participate in the program and get funding.
7 It was a requirement. Those things have changed
8 now.

9 But we still, for purposes of long-
10 range planning, transportation planning, for
11 project development, that information is needed
12 to be included in the long-range plan. It
13 includes part of the tribal transportation
14 planning, both at the level of the tribe and also
15 the Federal Lands transportation facilities.

16 And of course the bridges, as Sheldon
17 pointed out, it's still a criteria where it is
18 required and mandated by law that public bridges
19 or bridges that meet the definition of a public
20 bridge, 20 feet or longer, that are under the
21 ownership of a local authority, tribes being a
22 part of that definition of local public

1 authority, are required to have their bridges
2 inspected. All those bridges need to be
3 inspected as part of the new process.

4 As I mentioned, there's criteria in
5 the beginning, the preamble, that talks about
6 this, burden hours, what it typically would take
7 someone to gather this information, the costs
8 associated with it. If you look at it, there's
9 an opportunity there and instructions to comment
10 on that if you want to and submit them into the
11 address and/or the website that's requesting that
12 information.

13 Tribal transportation departments,
14 this was actually started under the rulemaking
15 process primarily to make sure that people
16 understood that this is one of the options that
17 tribes actually have is to develop a tribal
18 transportation department, including costs
19 associated with establishing, implementing and
20 making it run are eligible activities. There
21 were no significant changes as I mentioned
22 because it's something that was brought about by

1 the rulemaking process.

2 Resolving disputes, 34 and 35,
3 outlines the alternative dispute resolution
4 procedures. There's no major changes there. But
5 at the end it does include reference to FHWA
6 agreements because those are new since the last
7 time we had --

8 Other miscellaneous provisions which
9 is 941 through 942, and it basically talks about
10 research. May tribes become involved in
11 transportation research? And 942, can a tribe
12 use federal funds for transportation services for
13 quality of life programs? A lot of those are
14 programs that relate to transportation-related
15 activities. And if they're not on the list,
16 there's a way of being able to request their
17 eligibility as described earlier in, I believe
18 it's 1 or 2, or excuse me, A or B in the
19 regulations. So, all those are provided to
20 continue to expand as much as we can the
21 eligibility of activities as long as it stays
22 within the realm of transportation-related

1 activities.

2 And the last one, 943 describes that
3 the Tribal High Priority Projects Program is not
4 part of the TTP. And that information can be
5 found in the BIA and FHWA websites. Because it
6 is in law, it's referenced in a different part of
7 the law, but it also is funded through the
8 general fund, not through TTP. It is under the
9 authority of the Secretary. And the result of
10 that is, as most of you know, it has not been
11 funded in 2013, '14 and most likely not in '15
12 because it's under the general fund. So, the
13 result of it is it is not a TTP program but we
14 put that reference in there just to make sure
15 that people understood that if that ever changes,
16 there is a place, a location where people can
17 gather that information if they need it.

18 So, basically, that gets us to the end
19 of Subpart H and the reg itself. Are there any
20 questions or comments as we start to close up
21 here?

22 (No response.)

1 MR. GISHI: If not, thank you very
2 much for your time and your attendance. With
3 that, the formal consultation portion of today's
4 meeting has ended. And we will take a break for
5 10-15 minutes, and then Mr. Sparrow will come up
6 and we'll start doing the TTP updates and talk
7 about a bunch of other things. I might mention
8 also, if you haven't signed in, please do. This
9 becomes part of the record, so it identifies your
10 information as you choose to. It's available and
11 will be included in there. So, thank you very
12 much.

13 (Whereupon, the meeting was concluded
14 at 3:13 p.m.)

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This is to certify that the foregoing transcript

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Before: US Bureau of Indian Affairs

Date: 01-27-15

Place: Bloomington, MN

was duly recorded and accurately transcribed under
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