

# OVERVIEW OF 23 USC 202(a)(9) and IMPLEMENTATION UNDER MAP-21 and the FAST ACT

NATIONAL TRIBAL SYMPOSIUM TO  
ADVANCE TRANSPORTATION

San Diego, California

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# History of the Tribal Transportation Program Under Title 23

- Before 1982, authorization and appropriations for roads on tribal lands owned by the United States in trust for the benefit of Indians flowed under the Department of the Interior.
- 1982 – Surface Transportation Assistance Act (STAA)
  - Created the Federal Lands Highway Program (FLHP), bringing together authorization and funding for roads on lands owned by the United States, including tribal lands of over 500 Federally-recognized tribes.
  - Known as the “Indian Reservation Roads Program” (IRR), projects were selected by Bureau of Indian Affairs (BIA) on a “relative need” basis, and carried out by BIA through “direct service” or by tribes under a “self-determination” contract (also known as a “638 contract”).
  - Authorized Funding - 1983 at \$75M; 1984 through 1986 at \$100M

# History of the TTP

- 1987 - Surface Transportation Uniform Relocation Assistance Act (STURAA)
  - Amended 23 USC § 140 (d) to allow Indian Employment Preference on Federal-aid Projects.
  - Tribal Employment Rights (TERO) as an allowable cost.
  - Authorized Funding - 1987 through 1991 at \$80M

# History of the TTP

- 1991 – Intermodal Surface Transportation Efficiency Act (ISTEA)
  - Tribes authorized to become involved in transportation planning process.
  - Directed the establishment of an IRR Inventory.
  - Tribal Transportation Assistance Centers (TTACs) established.
  - Authorized Funding – 1992 at \$159M; 1993 through 1997 at \$191M.
- 1998 – Transportation Efficiency Act for the 21st Century (TEA-21).
  - Mandated negotiated rulemaking for new program regulations (25 CFR 170).
  - Authorized Funding: 1998 at \$225M; 1999 – 2004 at \$275M.
  - New IRR regulations published in July of 2004 and included:
    - Construction funds allocated based on a “relative need distribution formula” known as “tribal shares.” Tribes with few or no roads in the IRR inventory received little funding.
    - Scope of “contractible activities” expanded; BIA role begins to shift from delivering projects in the field to program management and oversight.

# History of the TTP

- 2005 – Safe, Accountable, Flexible and Efficient Transportation Act – A Legacy for Users (SAFETEA-LU)
  - Authorized tribes to contract with FHWA in accordance with P.L. 93-638.
  - Authorized tribes to expend up to 25% of their IRR funds on maintenance.
  - Authorized Funding - 2005 at \$300M; increased incrementally until 2009 at \$450M, where it remained under the SAFETEA-LU extensions through 2012.

## History of the TTP (continued)

- 2012 – Moving Ahead for Progress in the 21<sup>st</sup> Century (MAP-21)
  - Changed name to “Tribal Transportation Program.”
  - Enacted statutory funding formula to replace negotiated formula in Part 170.
  - New formula looked to historical data and annual population reports to determine tribal shares.
  - 2% set-aside for safety projects.
  - Under 23 U.S.C. §202 (a)(9), authorizes states to transfer “any funds” to tribes (via FHWA/BIA) for construction and improvement projects with oversight by FHWA or BIA.
  - Authorized Funding – 2013 through 2015 at \$450M.

# The TTP Today

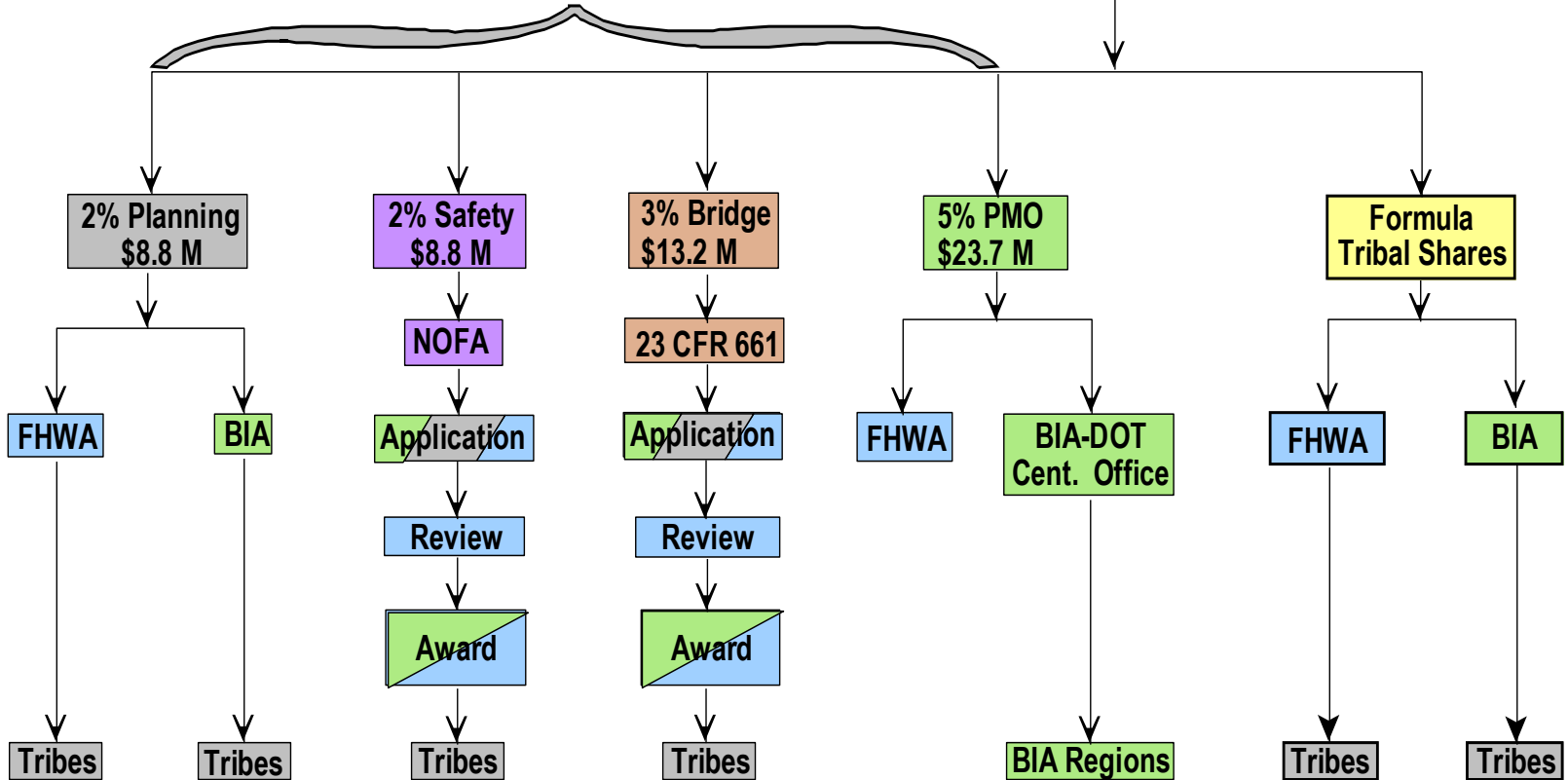
- 2015 – Fixing America’s Surface Transportation Act (FAST Act)
  - Established an Office of Self-Governance at US DOT, and directed negotiated rulemaking for regulations governing DOT’s self-governance program.
  - Authorized Funding – 2016 at \$465M, rising incrementally through 2020 at \$505M.
  - No other significant changes.

**\$465 M Authorized** → **Less Other Reductions & Lop Off \$25M = \$440**

**FAST Act**

**Tribal Transportation Program  
Trans. Improvement Prog. (TTPTIP)**

**Set-Asides**



Approximated FY16 funds



# TRIBES, LIKE STATES, ARE “PUBLIC AUTHORITIES”

Public authority. The term “public authority” means a Federal, State, county, town, or township, *Indian tribe*, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.

23 U.S.C. § 101 (a)(21)

Like States, Tribes Must Have a FHWA-  
Approved  
Transportation Improvement Program  
Before Funds Can Be Expended On A Project

Use of funds. Notwithstanding any other provision of this section, funds made available to Indian tribes for tribal transportation facilities shall be expended on projects identified in a *transportation improvement program* approved by the Secretary.

23 U.S.C. § 202 (b)(4)

## The Facility Must Also Be On The National Tribal Transportation Facility Inventory

In general. The Secretary of the Interior, in cooperation with the Secretary [of Transportation], shall maintain a comprehensive national inventory of tribal transportation facilities that are *eligible for assistance* under the tribal transportation program.

23 U.S.C. § 202 (b)(1)(A)

# MAP-21 Unambiguously Authorized Cooperation of States and Local Governments

MAP-21 – New section at 23 U.S.C. § 202 (a)(9)(A):

“The cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement.”

# MAP-21 Also Unambiguously Authorized BIA and FHWA to Transfer and Oversee Funds Received From States or Their Political Subdivisions

23 U.S.C. § 202 (a)(9)(B) provides that:

*“any funds* received from a State, county, or other local subdivisions *shall be credited to appropriations available* for the tribal transportation program.”

The entirety of § 202 (a)(9)  
remains unchanged in the FAST Act.

# Challenges For Tribes, States & Local Governments

- States & local governments are usually not familiar with Chapter 2 of Title 23/TTP because their world is Chapter 1.
- Tribes today are seeking a place at the table for state or other non-tribal projects on their lands, partly as a result of taking on “all but the inherently Federal functions” of the TTP under Program Agreements and other contract mechanisms.
- Politics of tribal-state relationships sometimes interfere with finding effective solutions benefitting tribes, states, counties, other governments and the traveling public.

# Funding Sources That May Be Eligible for a 202 (a)(9) Agreement

- Overall - Federal-aid and other Funds
  - Transportation Enhancement
  - Surface Transportation Program
  - Strategic Highway Research Program
  - Other discretionary funds from programs authorized under Title 23, or any other funds from a state, county, or other local subdivisions.
- Otherwise consistent with the mission of BIA and FHWA.

# Potential Projects Using Federal-Aid Funds

Consistent with Chapter 1 of Title 23:

- Access roads
- State highways and possibly other local roads.
- Interstates or interchanges
- Transportation Enhancement
- Active Transportation Program – bicycle, walking and other facilities or activities authorized under the ATP
- Other projects on a case-by-case basis

**THINK CREATIVELY!**



# BIA & FHWA Coordination

- Educating states and FHWA Division offices about the new law. Finding opportunities.
- After identifying opportunities, tribes, states, and BIA/FHWA must be patient but diligent in working together to reach an agreement that works for all three sovereigns.
- 25 CFR § 170.627 requires an agreement among Tribe, State and BIA/FHWA describing source and use of funds.
- A model agreement is now available. It's short yet comprehensive and flexible.
- In most cases, States are relieved of oversight responsibility upon funds transfer to FHWA or BIA. Negotiable if, for example, the project is on a state-owned facility.

# Moving Forward

- FHWA's fiscal office, working in cooperation with its Office of Chief Counsel, has issued internal guidance for how to "move" funds under agreements using 23 USC 202 (a)(9).
- This has further expedited the process for moving funds back to FHWA-HQ and onward to tribes through either FHWA – Federal Lands or BIA.

# Past Successes

## TEA-21 & SAFETEA-LU

- Agua Caliente
- Eastern Band of Cherokee

## SAFETEA-LU & MAP-21

- Red Lake – Redby Bridge Project

## MAP-21

- Tulalip – Interstate 5 Interchange

# Fast Progress Under the FAST Act

- California – Karuk Tribe, La Jolla Band of Luiseno Mission Indians, Paskenta Band of Nomlaki Indians (x2), and Trinidad Rancheria; one pending.
- Alaska – Native Village of Barrow, Native Village of Crooked Creek, Craig Tribal Association, Tanana Chiefs Conference, Native Village of Eyak, and Native Village of Circle.
- Minnesota – Red Lake Nation (x2, with one including MnDOT *state* funds), Leech Lake Band of Ojibwe (x2), Mille Lacs Band of Ojibwe, Grand Portage Band of Lake Superior Chippewa.
- South Dakota – Oglala Sioux
- Washington – Tulalip Tribes, Quinault Indian Nation, Jamestown S’Klallam Tribes
- New York – Seneca Nation of Indians.
- Arizona – Salt River Pima-Maricopa Indian Community, Gila River Indian Community, Colorado River Indian Tribes.

# TIGER & BUILD Grants Awarded to Tribes

TIGER I & II	TIGER III	TIGER IV	TIGER V
Navajo Nation	Wind River – Eastern Shoshone & Northern Arapaho Tribes	Turtle Mountain Band of Chippewa Indians of North Dakota	Pueblo of Taos Pyramid Lake Paiute
Oglala Sioux Tribe	Seminole Tribe of Florida		Village of Alakanuk
Pueblo of Laguna	Native Village Saint Michael		Oglala Sioux Tribe
TIGER VI	TIGER VII & VIII	TIGER IX	BUILD FY18
Makah Indian Tribe	Pueblo of Laguna (VII)	Turtle Mountain Band of Chippewa Indians of North Dakota	Nenana Native Association – Nenana Bridge Project
Hopi Tribe of Arizona	Native Village of Point Hope (VII)	Lower Brule Sioux	Turtle Mountain – Jackrabbit Road
Three Affiliated Tribes of the Fort Berthold Reservation	Rosebud Sioux Tribe (VIII)	Nunakauyarmiut Tribe (IX)	
Assiniboine & Sioux Tribes of the Fort Peck Reservation			

QUESTIONS?

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