Moving Ahead for Progress in the 21st Century (MAP-21):

Congress Overhauls the IRR Program and the Tribal Transportation Funding Formula

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PART 1
BACKGROUND ON THE NEW HIGHWAY LAW
Congress passed H.R. 4348, MAP-21 on June 29, 2012, after 10 extensions and months of debate.

President Obama signed MAP-21 on July 6, 2012, as Public Law 112-141. MAP-21 is a short term law covering only 27 months. It first extended SAFETEA-LU to the end of FY 2012. MAP-21 itself became effective on October 1, 2012 and covers FY 2013 and FY 2014.
# Progress in Tribal Transportation Funding

**ISTEA:**
- IRR Program authorized funding: $191 million

**TEA-21:**
- IRR Program authorized funding: $275 million (less $13 mil. for IRR Bridge Program and $30+ mil. ob limit deduct)

**SAFETEA-LU:**
- IRR program authorized funding: $300 - $450 million (less $30+ mil. ob limit)
- IRR Bridge Program: $14 million
- Tribal Transit Grant Program: $8 - $15 million
- DOI Tribal highway safety grants: 2% set aside ($4.7 million)
Progress in Tribal Transportation Funding (cont.)

MAP-21:

- Tribal Transportation Program: $450 million
- Tribal High Priority Projects Program: $30 million
  (Authorized but Congress must appropriate general funds each year.)
- Tribal Transit Grant Program: $30 million
- Tribal Highway Safety Grants: 2% set-aside
  ($4.7 million to BIA Highway Safety Program)
PART 2
TRIBAL TRANSPORTATION PROGRAM HIGHLIGHTS
Major Changes to the IRR Program

1. The Indian Reservation Roads (IRR) Program is now called the Tribal Transportation Program (TTP).

2. Congress overhauled the IRR Program funding formula.

3. Congress added 2% takedowns to the TTP for highway safety, transportation planning and bridge projects (for FY 2013 and FY 2014, each is funded at $9.0 million). IRR Bridge Program funding is cut $5 million from $14 million in FY 2012;

4. Congress eliminated the IRR HPP as a takedown from the TTP and established a separate Tribal HPP program authorized at $30 million per year; and

5. During development of MAP-21, Congressional staff claimed that MAP-21 would exempt the TTP from the obligation limitation deduction allowing the TTP to retain approximately $30 million, but the USDOT has determined that the final MAP-21 language does not accomplish this change.
New MAP-21 Definitions

A Tribal Transportation Facility is defined as:

A public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory.

MAP-21 deletes the term “Indian Reservation Road” but retains -- as eligible for inclusion in the Tribal road inventory -- public roads located within or providing access to Indian reservations, Indian trust lands, restricted Indian lands not subject to fee title alienation, which is essentially identical to the old IRR definition.
Other Major Tribal Program Changes

1. **Road Maintenance.**- Increases use of TTP funds for road maintenance needs. Authorizes the Secretary of Transportation to use $500,000 or 25% of Tribal TTP shares, whichever is greater, for Road Maintenance needs. BIA retains “primary responsibility” for funding the BIA Road Maintenance Program;

2. **BIA/FHWA Administrative costs.**- Authorizes the BIA and FHWA to use up to 6% of TTP funds for program management and project related administration expenses ($27 million per year);

3. **TTAP Funding.**- Authorizes the BIA to fund Tribal Technical Assistance Centers from its 6% administrative funds;
4. **National Bridge and Tunnel Inventory.** Requires USDOT, in consultation with the States and Federal agencies, to inventory all highway bridges on public roads, on and off Federal-aid highways, including tribally owned bridges and establish a National Bridge and Tunnel Inventory;

5. **Agency Data Collection consistent with P.L. 93-638.** Interior and FHWA must collect and report data necessary to implement the TTP, in accordance with reporting requirements under the Indian Self-Determination Act, P.L. 93-638. The BIA may be entitled to additional FHWA-Federal Lands Highway Program administrative funds to perform this task.
ENVIRONMENTAL STREAMLINING PROVISIONS

Directs the Secretary of Transportation to create, by regulation, new classes of *categorical exclusions* under NEPA to expedite projects, including projects within *operational rights-of-way* and any project that *receives less than $5 million* in federal funding assistance.

Most Tribal transportation projects will benefit from this change.
MAP-21 Retains SAFETEA-LU Tribal Provisions

1. **Tribal PS&E Approval.** - Continues to authorize Tribes to approve their own road and bridge designs (PS&E packages) with a health and safety certification from a state-licensed engineer;

2. **Use of Indian Labor.** - Indian labor may be employed to carry out any construction or other activity in accordance with Interior Department regulations;

3. **Cooperation of State, county or other local subdivisions.** - Funds received from a State, county, or local subdivision in support of a Tribal TTP project are to be credited to appropriations for the Tribal Transportation Program;
4. **Indian Preference**.- Indian preference in hiring and contracting applies to all funds administered by the Secretary of the Interior appropriated for the construction and improvement of Tribal Transportation Facilities.

5. **30-day transfer of TTP funds to Tribes**.- Requires BIA to distribute TTP funds to Tribes no later than 30 days after the funds are made available to BIA;

6. **Tribe-State Maintenance Agreements**.- No Interior Secretary approval required for States and Tribes to enter into maintenance agreements.

7. **Direct FHWA TTP Funding Agreements**.- Tribes may continue to receive TTP funds directly from FHWA under new or current Program Agreements and RFAs.
## MAP-21 CHANGES

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<td>Statutory Tribal HPP (separately funded $30 million program but Congress must fund it each year)</td>
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PART 3
OTHER MAP-21
TRIBAL PROVISIONS
Major Changes to the Tribal Transit Program

Tribal Transit Grant (5311)(c)) Program.-

- Authorization doubles program funding from $15 million to $30 million annually;
- FTA will distribute $5 million to Tribes as competitive transit grants;
- $25 million will be apportioned to Tribes under a new transit formula grant for existing transit programs.
MAP-21’s Tribal Transit Grants (5311(c))

Of the $25 million set aside each year for Public Transportation on Indian Reservations under MAP-21:

- $12.5 million (50%) will be provided to Tribes providing public transportation services based on the Tribe’s ratio of vehicle revenue miles compared to the total number of vehicle revenue miles provided by all Tribes;

- $6.25 million (1st 25%) is shared equally among Tribes providing at least 200,000 vehicle revenue miles of public transportation service annually, as reported to the Secretary of Transportation; and
MAP-21’s Tribal Transit Grants (5311(c))

- **$6.25 million (2\textsuperscript{nd} 25\%)** is to be provided to Tribes providing public transportation on tribal lands (as defined by the Bureau of the Census) **where more than 1,000 low-income individuals reside** (as determined by the Bureau of the Census).

- The **2\textsuperscript{nd} $6.25 million distribution is capped at $300,000 per Tribe per year**, with any remaining funds re-distributed among Tribes receiving less than $300,000 per year.

- A Tribe may also finance public transportation services provided by a “**non-Tribal transit provider**” that connects **residents of tribal lands with surrounding communities**, improves access to employment or healthcare, or “otherwise addresses the mobility needs of tribal members.”
MAP-21’s New Tribal High Priority Program

MAP-21 discontinues the IRR High Priority Project Program and instead authorizes a new **Tribal High Priority Program**. This new program is not a takedown from the TTP but requires a separate appropriation from Congress to fund it. MAP-21 authorizes up to **$30 million** to carry out the new Tribal High Priority Program.

Tribal “high priority projects” **may receive $1 million per project**, except for disaster or emergency projects, which may receive the full estimated cost of repairing the damaged tribal transportation facility. MAP-21 uses the same project scoring matrix established in the IRR Program regulations to rank applications received under the new Tribal High Priority Program.
MAP-21’s New Tribal High Priority Program

Congress must appropriate $30 million in the FY 2013 budget for the new Tribal High Priority Program to become active. Congress has passed a six-month continuing resolution (CR) to cover appropriations for FY 2013 through March 27, 2013 which does not include this extra funding.

As a result, funding for the new Tribal High Priority Program is not assured for FY 2013. Tribes may wish to contact their House and Senate delegations to request that funding for MAP-21’s new Tribal High Priority Program (Sec. 1123 of MAP-21) be included in FY 2013 appropriations for the U.S. Department of Transportation.
MAP-21 contains additional grants and financing assistance programs that Indian tribes may qualify for as direct funding recipients or as sub-recipients through their State Transportation Departments.

Tribes may consolidate USDOT grants and finance eligible projects independently or in conjunction with other transportation stakeholders.

MAP-21 imposes numerous “tribal consultation” requirements on States, MPOs and other transportation public authorities to work closely with Tribal governments.
Questions?

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THE ROADS LESS TRAVELED
IRR in the Demolition Derby Ring

Philip Baker-Shenk – Holland & Knight LLP
TRB Webinar: Current Transportation Issues in Indian Country
October 11, 2012
APPROPRIATIONS FRAMEWORK

• MAP-21
  – Transportation budget accounts are complex
  – Continuing Resolution or “CR” currently rules
    • Increases (0.612%) and decreases come and go
  – Sequestration Terrorization – what does it mean?
TRIBAL FUNDING FORMULAS

• MAP-21 authorizes $450 million per year
  – Contract authority

• MAP-21 statutory formula replaced tribally negotiated rulemaking formula of Relative Needs Distribution Factor or RNDF
  – A sea-change in federal policy

Holland & Knight
TRIBAL FUNDING UNDER MAP-21

• How did this change happen? Why?

• New statutory MAP-21 formula
  – 27% based on a tribe’s relative share of national approved road mileage
  – 39% based on a tribe’s relative share of HUD Indian housing population (self-identified)
  – 34% based on a tribe’s share of RNDF and population adjustment factor funding from FY2005 to FY2012

Holland & Knight
TRIBAL SUPPLEMENTAL ALLOCATION

• A last-minute compromise set aside $104 million to be divided up and paid as a supplement to soften funding cuts to certain tribes in each BIA region caused by the new MAP-21 formula

• All funds are treated as 100% federal share
  – May be used to satisfy local match requirements
DURATION OF MAP-21 AND BEYOND

• MAP-21 authorizes programs for 27 months, with spending authority through September 30, 2014.

• What’s next?
  – Already negotiations have begun on the next highway bill
  – Crushing budget constraints caused by diminishing deposits into the Highway Trust Fund from federal excise gas tax receipts as fuel economy and fuel prices both rise and recession-sensitive driving decreases
  – A unified focus on safety and access is the only winning solution

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Holland & Knight
MAP-21: Implementation Challenges Facing Tribes and Federal Agencies

Presented by Michael Willis

Transportation Research Board
Webinar
October 11, 2012
Scope of MAP-21 Changes

• Restructuring: IRR to TTP
• Consolidation of Federal Land Highway and Tribal Programs
• New TTP Funding Formula
• New Provisions for the Acceleration of Project Delivery
Timing and Funding Challenges

- Two-year Authorization
- Appropriations and Federal Budget Questions
Developing Implementation Guidance through Consultation

• Executive Order 13175
  • Consult early in developing regulations having tribal implications

• 25 CFR Part 170
  • Consult to the maximum extent permitted by law to facilitate implementation of transportation programs consistent with tribal sovereignty and the government-to-government relationship
MAP-21 Implementation: A Shared Challenge

- Collaborative work to put MAP-21 into action for success
  - Federal agencies, Tribal Leaders, Program Coordinating Committee
- Haste to implement should not diminish consultation
MAP-21 Policies with Tribal Implications Extend Beyond TTP

• Even within TTP, complexity and timeframes offer true challenges
  • New and modified program components
• Uniform policies for all public federal lands and tribal transportation facilities
• Program consolidation: tribes impacted, yet directives not clear
Tribal Implications, Tribal Consultation?

• Tribes and agencies will need to engage other governmental entities
  • High-Risk Rural Roads - already in progress
  • Bridge Inventory/Compliance
  • Federal Lands Access Program
  • Recreational Trails, Safe routes to Schools (Transportation Alternatives Program)
  • Streamlined NEPA
Fund/Program Administration: ISDEAA Agreements

- **TEA-21:**
  - ISDEAA applies to IRR (BIA/DOI)

- **SAFETEA-LU:**
  - ISDEAA extends to FLH/DOT

- **MAP-21 adds new elements**
  - TTP implementation through contracts with Indian tribes and state governments
  - Transportation planning data collection contractible in accordance with the ISDEAA
MAP-21 and ISDEAA Agreements

• Existing contracts and agreements must be updated to reflect MAP-21 approach
• New Data Collection ISDEAA Agreements
• New Section 202(a)(2) agreements with Tribes or States
• Education and training for awarding officials, tribes
Conclusion

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RIGHT OF WAY ACQUISITION ON TRIBAL LANDS

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PRESENTATION GOALS

- ABE-80 Committee on Native American Transportation Issues
- Background on Tribal Lands and transportation
- Discuss the FHWA and BIA program requirements associated with Right of Way acquisition on Federally funded projects
- Discuss the importance of identification of Tribal property interests - trust status, checkerboard ownership and prevalent authorities for Right of Way acquisition
- Potential Impact of Carcieri v. Salazar
Background – ABE80

- TRB Committee on Native American Transportation Issues
- Formed in 2001
- Previously a subcommittee of ADC50, Committee on Historic and Archeological Preservation in Transportation
  - Committee on Low Volume Roads
ABE80 - Scope

The Committee is concerned with research and practice pertaining to transportation issues on or near tribal lands and communities or affecting tribal historical or cultural properties wherever located. Tribal transportation issues include all modes of moving people and goods from one place to another, all relevant agencies, including tribal, state, federal, regional and local providers, and all relationships and interactive processes of various governmental units - tribal, federal, state, and local - with regard to the development, planning, administration, coordination, and implementation of transportation laws, policies, plans, programs, and projects.
A Guidebook for Successful Communication, Cooperation, and Coordination Strategies Between Transportation Agencies and Tribal Communities
Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands

Last Modified Date: 10/15/2009

Richard Jones and Vivian Philbin
Get Involved With ABE-80

- Committee Co-Chairs
  - Edward Hall, III
  Division of Transportation
  Bureau of Indian Affairs
  Edward.Hall@bia.gov
- Raquelle (Kelly) Myers
  Western Tribal Technical Assistance Program
  National Indian Justice Center
  NIJC@aol.com
Background on Tribal Lands and Transportation

■ “(31) TRIBAL TRANSPORTATION FACILITY.— The term ‘tribal transportation facility’ means a public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory described in section 202(b)(1).
Complex System

- 41,000 miles owned by BIA and Tribes
- 81,000 miles under State and local ownership
- Inventory subject to MAP-21 revision
No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.
The Uniform Act

- a.k.a. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended
  - 42 U.S.C. 4601 *et. seq.*
Uniform Act provides payment for:

- Compensation for the property acquired and damages to any remainder for ROW
- Relocation Assistance and Advisory Services
- Moving costs
- Replacement Housing (Decent Safe and Sanitary)
- Business Reestablishment
- Discretionary Utility Relocation
REQUIREMENTS OF THE UNIFORM ACT -3

- Compensation is based on an appraisal
- Expeditious acquisition
- No Coercive Action. EVER
- Payment is made to the property owner before taking possession of the right of way
APPRAISAL STANDARDS

- Uniform Standards of Professional Appraisal Practice (USPAP) used by FHWA

- BIA may have appraisal requirements that supplement these requirements, e.g. the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA – “yellow book”)

- Both BIA and FHWA - Any affect on the appraised FMV of the property caused by the project is disregarded
Do We Have To?

- Compliance with the Uniform Act
  - 25 CFR 900.125.c.3
  - 49 CFR 24.1, 101
  - 23 CFR 710

- Certification Of Right of Way
  - 23 CFR 635.309
  - Legal Right to Occupy Right of Way
  - Uniform Act and All Other Directives Have Been satisfied
  - 25 CFR 170.460.b.2
Authority of Parties

- Inherent Tribal Sovereignty
- Contracts
- Compacts
  - Government to Government
  - Not commercial in nature

- U.S. Constitution
- Congress
- Federal Agencies
- State Government
  - Local Government
Federal Policies

- Federal Indian Policy
- Tribal Self-Determination
- Federal Trust Responsibility

- Federal Transportation Policy
- Federally assisted state transportation program
- Protection of state sovereignty in project selection
Two Highway Programs and Systems – Federal Funds

- Federal Aid Highways
  - 23 USC Chapter 1
  - 23 USC §108 Advance Acquisition of Real Property Interests
- Direct Recipient
  - Various Authorities

- Tribal Transportation Program
  - Formerly Indian Reservation Roads Program
  - 23 USC Chapter 2
- Direct Recipient
  - Various Authorities
UNIQUE ROLES

- **Tribe**
  - Ownership or Tenancy Information
  - Land Sales Data
  - Approvals and consent

- **BIA**
  - Authority to Convey Easements on Trust Land
  - Ownership Information
  - Appraisal and granting approvals
  - Trust Responsibility

- **FHWA/FLH**
  - Oversight and Stewardship of Federal Funds and Regulations
  - Trust Responsibility

- **State DOT**
  - Requests Easement for Federal Aid Projects
Checkerboard Ownership
THE CHECKERBOARD OF OWNERSHIP AND INTERESTS

NONAME INDIAN RESERVATION

LEGEND:
- US Forest Service
- State DNR
- Bureau of Land Management
- Fee Private ownership

INDIAN RESERVATION LAND
- Federal Trust Land
- Allotted Land
- Tribally Owned Lands
- Fractionated Land
- Undivided Interest
- Off-Reservation Trust Land
- Fee Simple
- Restricted Fee Land
- Forcible Fee Patents
- Fee-to-Trust Conversion

ROAD OWNERSHIP JURISDICTION:
- Interstate Route
- US Route
- State Route
- County Route
- Forest Route
- BIA or IRR Route
PATCHWORK OF OWNERSHIP - CONFUSING AUTHORITIES

- Trust
  - BIA authority 25 CFR 169
  - Uniform Act
  - Functional Replacement?
  - Land Exchange?

- Allotments
  - Trust - BIA authority 25 CFR 169
  - Fee - Uniform Act

- Land Assignments
  - Land - BIA authority 25 CFR 169
  - Tribal Law
  - Tenants - Uniform Act
PATCHWORK OF OWNERSHIP - CONFUSING AUTHORITIES -2

- Fee land
  - Uniform Act
- Federal land
  - Federal Land Managing Agency Authority, or
  - DOT Authority under 23 USC 107d, 317
- Non Federal Public (State, County, City, etc)
  - Functional Replacement
  - Uniform Act
- State Law
- Condemnation
Nature of the Property Interest Acquired

- Easement
  - Right-of-way
- Lease
- License
- Permit

- Perpetual
- Term of years
- Utilities?
Carcieri v. Salazar (2009)

- Post 1934 land into trust transfers ruled invalid
- Currently 565 federally recognized tribes
- 1934 there were 292 federally recognized tribes
- 50’s and 60’s several tribes were terminated and 37 have been reestablished and land put back into trust
- All of the over 200 tribes in Alaska were recognized after 1934
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<tr>
<th>Cultural Competency</th>
<th>Cultural differences between tribes and transportation agencies can make collaborative efforts like communication difficult as agency and individual interaction protocols can differ between parties.</th>
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</thead>
<tbody>
<tr>
<td>Protection/Preservation of Tribal-Sensitive Resources</td>
<td>For cultural, environmental, and historical reasons, tribes often consider resources, otherwise not considered sensitive, as needing to be preserved regardless of the need for transportation facilities.</td>
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<tr>
<td>Confidentiality of Tribal-Sensitive Matters</td>
<td>Cultural practices and historical considerations often limit tribes on the extent of information that they can share with other project stakeholders. It may be that a tribe has knowledge of a historic or cultural property that needs to be protected, but the location of the site is confidential.</td>
</tr>
<tr>
<td>Sovereignty</td>
<td>The federal government recognizes tribes across the nation as separate, sovereign nations, whose jurisdictions and institutional relationships and protocols must be recognized. State/tribal issues such as jurisdictional issues in civil and criminal matters complicate intergovernmental issues.</td>
</tr>
<tr>
<td>Land Ownership</td>
<td>Common land ownership issues like right-of-way can lead to difficulties to project completion. In addition to common issues, consideration must be given to unique land ownership situations in the tribal context, like the management of trust lands by tribes.</td>
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<tr>
<td>Funding</td>
<td>While project funding issues are also common to all transportation projects, the tribal transportation context leads to different types of funding issues involving multiple sources. Project funding can be provided by the tribe, state or BIA affairs to complete tribal-needs projects.</td>
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Figure 1. Ladder of collaboration.

(*) This right is usually established for federally-recognized Tribes while it may be an issue itself for other Tribal entities.
CONCLUSION

- Assure that Right of Way associated tribal consultation occurs EARLY in the acquisition process
- Know the estate of each property being acquired
  - Determine regulatory authority for acquisition
- Know the acquisition requirements of each funding agency, FHWA, BIA, State DOT, Tribe
- Determine ROW acquisition strategy EARLY -- During Planning phase