

U.S. DEPARTMENT OF EDUCATION

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OFFICE OF INDIAN SERVICES

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DIVISION OF TRANSPORTATION

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TRIBAL CONSULTATION ON THE NOTICE OF PROPOSED
RULEMAKING FOR 25 CFR PART 170

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TUESDAY
JANUARY 13, 2015

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The Tribal Consultation met in the
Holiday Inn Capital Plaza, 300 J Street,
Sacramento, California, at 9:00 a.m., Andy
Caulum, Moderator, presiding.

PRESENT:

ANDY CAULUM, Moderator

LEROY GISHI, Chief, Division of Transportation,
Bureau of Indian Affairs

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

SHELDON KIPP, Division of Transportation, Office
of Indian Services, Bureau of Indian Affairs

VIVIAN PHILBIN, Office of Chief Counsel, Federal
Highway Administration

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Adjourn

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

2 9:03 a.m.

3 MODERATOR CAULUM: Welcome to our first
4 consultation session on the Notice of Proposed
5 Rulemaking for 25 CFR Part 170. I recognize a
6 few of you in the room, and some of those few of
7 you may have been involved in the negotiated
8 rulemaking for the current Part 170, which this
9 NPRM proposes to revise.

10 I just want to go through a few
11 housekeeping things. Let's see. We first
12 started putting together a draft of the revision
13 of 25 CFR 170 about six months after the now-
14 extended transportation authorization came into
15 effect, Moving Ahead for Progress in the 21st
16 Century, MAP-21.

17 We did consultations at I believe it
18 was four locations on the draft of 25 CFR 170.
19 We also before we started doing those
20 consultations worked with the Tribal
21 Transportation Program Coordinating Committee
22 which is made up of a primary representative and

1 alternate from each of BIA's 12 regions. They
2 had a fair bit of input in that as well. And
3 then we took comments during the draft
4 consultation process, both at the meetings and
5 online, and through the mail. All those.

6 And then after that we sat down and
7 looked at the comments, looked at what we had put
8 out in draft form and did some revisions. And
9 that was eventually published last month in the
10 Federal Register, as well as the notice of the
11 consultation dates and locations.

12 This is considered to be formal
13 consultation by the Department, Government
14 consultation by the Department with tribes and
15 interested parties and the public.

16 As you can see we have a court
17 reporter here. And at the end of the meeting the
18 court reporter will be putting together a
19 transcript that they'll send to us, as well as
20 including all of the -- any exhibits any tribes
21 would like to submit, any letters or things of
22 that nature. Those will also be included in the

1 consultation record. Like we did with the draft
2 rule, we'll pull all those together.

3 And after we're done with the
4 consultation sessions, we're doing -- in this
5 case we're doing six of them. We're doing
6 meetings here. Later this week on Thursday we're
7 going to be doing a meeting in Phoenix, Arizona.
8 In another two weeks we're doing a meeting in
9 Minneapolis. Actually Bloomington, Minnesota at
10 the Embassy Suites there right near the airport.
11 We're doing another meeting in Oklahoma City
12 later that week. And then in February we're
13 doing a meeting in Anchorage and then one in
14 Seattle.

15 And if any of you are interested,
16 you're welcome to join us at any one of those
17 sessions as well, although one of the things
18 that's sort of a hallmark of consultations is
19 that the presentation that's made here will
20 basically be frozen in terms of the PowerPoint
21 that we're doing. It will be the same at all the
22 consultation sessions. And we are required also

1 to get through all of the agenda at those
2 meetings as well.

3 So an important on our comments during
4 the meeting, when you stand to ask any questions
5 that you might have, we request that you go to
6 the microphone and identify who you are, and also
7 if you're here representing a tribe, which tribe
8 you're here representing. And if you're say a
9 lawyer or you're not representing a particular
10 tribe, that's fine, but if you are here on behalf
11 of a particular tribe, that would be helpful for
12 us.

13 Oh, and also could you spell your last
14 name for the court reporter so we have it
15 accurate in our record?

16 When questions will be taken. In some
17 cases if you have a question on a particular item
18 in one of the subparts, it's possible that we're
19 going to be addressing it in a couple slides
20 further ahead in the presentation, so Mr. Gishi
21 or Mr. Sparrow might just respond to you that way
22 and hopefully your question will be answered in a

1 couple slides. If you still have it, please feel
2 free to come up to the microphone and ask it.

3 We also have handout available in the
4 back. It includes the slides that we're
5 presenting here, a copy of the Federal Register
6 notice. And I'm not sure quite what else we have
7 back there besides that, but you're welcome to
8 take any of those, if you wish. And if we for
9 some reason run out of copies, we'll get you some
10 more or we can email them to you as a PDF.

11 In terms of the meeting expectations,
12 we're going to get through our entire agenda as
13 published in the Federal Register today. We'll
14 stay as long as we need to to do that. I think
15 that timing wise we should have plenty of time to
16 get through it. If we seem to be moving a little
17 more quickly, we'll have to consult and decide
18 whether we're going to do it before or after
19 lunch, although since some people might be
20 interested in something after lunch, we might
21 break a little early for that if we're moving
22 more quickly.

1 Briefly I want to introduce myself.
2 And first I'd like to acknowledge the regional
3 director Amy Dutcske. She's not here today, but
4 she's the regional director for the Pacific
5 Region.

6 The regional road engineer is Steven
7 Wilkie. He's here today. If I could ask him to
8 stand. Many of you might know who he is. He's
9 been with the program for quite some time.

10 The chief of the Bureau of Indian
11 Affairs Division of Transportation is LeRoy
12 Gishi. Many of you know him, I'm sure.

13 Federal Highway's Office of Chief of
14 Counsel, Deputy Chief Counsel Vivian Philbin is
15 here. She's my opposite at Federal Highway.

16 MS. PHILBIN: Good morning, everyone.

17 MODERATOR CAULUM: She's been with
18 Federal Highway for quite a while.

19 Bob Sparrow is with Federal Lands
20 Highway. He's the tribal transportation program
21 director. He's here.

22 MR. SPARROW: Good morning, everyone.

1 MODERATOR CAULUM: IN the back we have
2 Sheldon Kipp who works in the BIA Division of
3 Transportation's Central Office in Albuquerque.
4 Many of you if you've done updates, for example,
5 to the Tribal Transportation Facilities
6 inventory, you've worked with Sheldon on that.
7 And TIPS. Pretty much everything. He's LeRoy's
8 right-hand man when it comes to all of that
9 stuff.

10 Also in the back we have Rosina
11 Carrion. She's responsible for making sure,
12 among other things, that all these meeting rooms
13 are set up and we have what we need to make
14 things go. With her is Martha Ghoudimipour.
15 Rosina works out of the Albuquerque office.
16 Martha works in D.C. with LeRoy. And sometimes
17 Martha can be a bit of my worst nightmare. If I
18 haven't surnamed a letter for her, she'll come
19 and stand in my doorway and just basically until
20 I look up and then just say where's my surname?
21 So she keeps me in line as well.

22 Moving on to the agenda -- oh, I'm

1 sorry. Before I move on to the agenda, I'd like
2 if all of you would like to maybe stand and
3 introduce yourself -- or you don't have to stand,
4 but just introduce yourself and where you're
5 from. If you decline to do that, that's fine,
6 too. You don't have to tell us who you are. Go
7 ahead.

8 MS. PHILBIN: This might be a good
9 time, while you're introducing yourself, to spell
10 your last name so the court reporter at that time
11 has it all. So then each time you speak, if you
12 have a question or a comment, you don't have to
13 spell your last name again. I would remind
14 everyone --

15 MODERATOR CAULUM: Vivian, we told
16 them not to do that. We got it.

17 MS. PHILBIN: -- you got it already --
18 okay -- to sign the sign-in sheet. And that
19 every time you -- even though you may have asked
20 five different questions or had five comments,
21 each time introduce yourself. Thank you.

22 MODERATOR CAULUM: And let's see.

1 Where to start? We'll start in the back left.
2 How does that sound? We'll move forward. That's
3 you, I think.

4 (Introductions)

5 MODERATOR CAULUM: Welcome. Welcome,
6 everyone. We're very glad to have all of you
7 here and it's great to have people from my home
8 state of Wisconsin who've traveled a long way to
9 come out here. I suspect it might have something
10 to do with the fact that when I looked at the
11 temperature in Northern Wisconsin today it said
12 minus 20. And I think down near Ho-Chunk it was
13 around minus 10 or so. So it's a little more
14 pleasant in California.

15 (Laughter)

16 MODERATOR CAULUM: At least this time
17 of year.

18 So we're going to the agenda next. As
19 you can see, I think we've allotted a fair amount
20 of time for each section. And we'll start, as we
21 are right now, with the welcome and
22 introductions. We're going to go through then

1 the preamble and Subparts A through C. And then
2 we're going to take a break from 10:30 to 10:45.
3 10:45 to noon we'll continue the review of the
4 NPRM Subparts D through F. After an hour-and-
5 fifteen-minute lunch break we'll reconvene at
6 1:15 for Subparts G through H. Take a 15-minute
7 break at 2:15. And then we'll go into questions
8 and answers at 2:30 to 3:45, and then closing
9 comments.

10 At 4:00, or at the end of this, we're
11 going to adjourn the formal consultation. The
12 record will be closed at that time, but Mr. Gishi
13 and Mr. Sparrow are going to present a Tribal
14 Transportation Program National Update, and that
15 will include various items. In particular, as
16 many of you know, the current transportation --
17 the extension of MAP-21 expires at the end of
18 May, so there are some things that we would like
19 to take this opportunity to do some updating on
20 and let you ask any questions that you may have.

21 One of the things unfortunately that
22 we may not have is a whole lot of information on

1 exactly what Congress is up to because at this
2 point I'm not quite sure Congress has figured out
3 what they're up to just yet when it comes to the
4 next transportation bill other than the fact that
5 they have to address it by the end of May.

6 So why are we here? Well, in 1998
7 Congress passed the transportation Equity Act for
8 the 21st Century. That directed the Secretary of
9 the Interior to enter into negotiated rulemaking
10 to develop program regulations and establish a
11 funding formula for the Indian Reservation Roads
12 Program.

13 Like I had mentioned earlier, there
14 are some of you in the room here who went through
15 a good bit of that process, and eventually in
16 July of 2004, 25 CFR 170 in its current form was
17 published in the Federal Register. That also
18 established the IRR Bridge Program as a set aside
19 of the main program.

20 Then in 2005, or really only about a
21 year after the current regulation was published
22 in the Federal Register, Congress passed the Safe

1 Accountable Flexible Efficient Transportation
2 Equity Act, a Legacy for Users, or known as
3 SAFETEA-LU. That provided an opportunity for
4 eligible tribes to enter into funding agreements
5 directly with Federal Highway.

6 And as we will get into later on in
7 the presentations, that, along with some other
8 things, has started really a sea change in how
9 the program is delivered for many tribes across
10 the country. It also allowed 25 percent of each
11 tribe's share to be used for maintenance. It
12 identified specifically the amount to be set
13 aside for program management and oversight for
14 the running of the program, which is shared
15 between the Department of Transportation and the
16 Department of the Interior. It allowed tribes to
17 approve their own plan specifications and
18 estimates after certain conditions are met,
19 identified National Tribal Transportation
20 Facility Inventory, and made the IRR Bridge
21 Program a stand-alone program.

22 And it was authorized through 2009.

1 And as many of you who have been involved with
2 Tribal Transportation, as it used to be known
3 now; it used to be known as the Indian
4 Reservation Roads Program, SAFETEA-LU has
5 extended nine times and went through the end of
6 fiscal year 2012.

7 During SAFETEA-LU BIA and Federal
8 Highway moved ahead to update 25 CFR 170 to
9 reflect changes that came about as a result of
10 SAFETEA-LU, however, the effort was stopped due
11 to upcoming change in administrations, which
12 eventually became the Obama Administration in
13 2008. Once the new administration was in place,
14 the action was delayed because SAFETEA-LU kept on
15 getting extended and extended, and we didn't know
16 when it was going to be replaced except that it
17 was only being extended for three months or six
18 months at a time for the most part, if I remember
19 correctly.

20 So then why are we here now? MAP-21,
21 Moving Ahead for Progress in the 21st Century,
22 was passed in June of 2012. Some of you remember

1 at the time we were out doing consultations on
2 what was called Question 10, which was an issue
3 that arose as a result of certain aspects of the
4 current rule that eventually was overtaken by the
5 passage of MAP-21 at the end of June of 2012.

6 MAP-21 put in place some pretty
7 significant changes for the program in terms of
8 -- well, fundamentally it changed the name of it
9 to the Tribal Transportation Program, replaced
10 the existing funding formula that had been
11 developed through negotiated rulemaking with a
12 statutory funding formula. So in other words,
13 from the administration side of the program we
14 had -- well, in the prior funding formula we
15 didn't have any real ability to change it, but at
16 this point there was no tweaking that really
17 could be involved. And as a result, as a
18 statutory formula it's just sat, and that's it.

19 The funding formula though, as many of
20 you may know, went for more than two years. I
21 believe it was the six-year horizon that Congress
22 set up in the current funding formula for MAP-21,

1 which when we saw that I remember in particular
2 me thinking, well, it's only a two-year bill.
3 Why do they have a -- I believe it was a six-year
4 horizon in the funding formula. And I thought,
5 well, they extended SAFETEA-LU nine times for
6 about three years, so that might actually work
7 out just about right by the time the new
8 reauthorization has been passed.

9 One other significant change in MAP-21
10 was it increased the amount of funding that a
11 tribe could use for maintenance activities. It
12 also further clarified the National Tribal
13 Transportation Facility Inventory, removed the
14 High Priority Projects Program from the Tribal
15 Transportation Program and reestablished it as a
16 stand-alone program to be funded through the
17 general fund. In other words, it was not going
18 to be funded through funds available from the
19 Highway Trust Fund.

20 Congress would have to actually
21 appropriate funds for the High Priority Projects
22 Program, and to date Congress has not done so.

1 Establish a new set-aside for tribal safety
2 projects and activities and establish authority
3 for tribes to receive federal aid funds from a
4 state to carry out work. That is what we have in
5 the past known as -- we call Section 132
6 agreements. In other words, say a state receives
7 Federal Highway funds for its -- under the
8 formula under Chapter 1 Title 23.

9 We have had a number of tribes entre
10 into agreements with states to carry out
11 projects, say for example rebuilding a portion of
12 a state-owned highway that goes through their
13 tribal lands, or a locally-owned road that goes
14 through their lands where the state, under an
15 agreement that BIA is a part of, will transfer
16 the Federal Highway funds that they have received
17 back to Federal Highway and it will come over to
18 BIA. Then those funds will go out to the tribe.
19 The tribe can carry out the work.

20 MAP-21 inserted a provision at
21 202(a)(9) that Federal Highway's fiscal law
22 people have interpreted as allowing now Federal

1 Highway to be able to transfer those funds to a
2 tribe. And also of course BIA can continue to do
3 that under 202(a)(9). And that is something just
4 personally that I encourage tribes to, if you
5 can, try and find ways to see if you can work
6 with your local governments or state governments
7 to carry out those kinds of activities,
8 especially for roads that go through your lands
9 that may be owned by a state or local government.

10 So why are we here today? BIA and
11 Federal Highway began updating 25 CFR 170 to
12 reflect current laws and operational processes,
13 although all parts of the existing Part 170
14 reviewed only the sections requiring an update
15 due to changes in the law, updated operations or
16 approved policy clarifications developed by the
17 Coordinating Committee were modified. At the
18 outset of this as I mentioned earlier on the
19 draft in particular, as well as then after the
20 draft, we consulted with the Tribal
21 Transportation Coordinating Committee to get
22 their views on what they thought should be

1 changed as well.

2 The draft NPRM was published in the
3 Federal Register in April of 2013. Three
4 consultation sessions were held. I erroneously
5 said there were four. There were three:
6 Anchorage, Phoenix and Minneapolis. Comments
7 were received. Changes to the draft were made
8 and the NPRM we'll be discussing today was
9 published in the Federal Register on December
10 19th.

11 In addition to comments that you may
12 be giving here, if you'd like to submit written
13 comments, you're welcome to do so through the
14 BIA's Web site. I would recommend that if you
15 can do so that you use the Web site. It's a
16 little easier on our end. Also, because if
17 people send mail the Department, it actually goes
18 through the anthrax -- I call it the anthrax
19 cooker, and it ends up coming to us as kind of a
20 little bit of -- it's kind of brown and it's kind
21 of crinkly, and it's not an easy thing to put in
22 the scanner and do all that. So if it's easy

1 enough for you to send it by PDF, we are happier
2 if you would do that. But you're welcome to fax
3 them or mail them to us as well, if you wish.

4 So why are we here? Two versions of
5 the NPRM remain available, and this is something
6 that -- one was published on the BIA Web site on
7 December 12th, 2014. Then in the Federal
8 Register that was published on December 19th,
9 there were some modest or some minor changes that
10 the Federal Register made unilaterally, and these
11 were things that we weren't told about until we
12 read it. And they are items that we will be
13 dealing with the Federal Register on as we move
14 forward, but we wanted to point them out so
15 everyone was aware of them. This information,
16 along with this presentation, is also posted on
17 the Federal Highway and BIA Web sites. So
18 hopefully anyone that sees that will notice these
19 differences.

20 They were mostly editing and format
21 changes. Federal Register has a certain way of
22 the way that they require things to be put

1 together in format-wise and a couple editing
2 issues, but those weren't substantive in any way.
3 However, two sections were modified. Subpart C
4 at 170.202(d), the statutory reference to the
5 date of MAP-21 enactment in effect as of July 5,
6 2012 was removed. We need to work with the
7 Federal Register on this because it needs to stay
8 as it further clarifies the time frame the MAP-21
9 funding formula must use when determining travel
10 shares.

11 Many of you may recall that this
12 particular reference is to I believe the
13 inventory as of July 5, 2012. It took a snapshot
14 of the inventory as of that date, and using that,
15 that was one of the factors then that drove the
16 statutory funding formula, and then out the other
17 end comes each tribe's share. So that reference
18 has to stay in. And we'll work with the Federal
19 Register on addressing that.

20 Also in Subpart C at 170.226(b) the
21 word "proposed" was deleted from the language.
22 In this case "proposed" means new and not

1 previously approved. We will work with them on
2 addressing that also.

3 And as a -- I won't say a side
4 comment, but something also to consider, if
5 Congress manages to pass a new transportation
6 authorization, those two references may end up
7 becoming obsolete by the time our process is
8 finished. It just depends on what the funding
9 formula looks like. If it stays largely related
10 to -- or if Congress continues to use that -- or
11 I'm sorry, if Congress does not take out the
12 reference to July 5, 2012 in whatever the new
13 funding formula is, then it will have to stay.
14 If they change it dramatically, we'll have to
15 address that as well as we move forward.

16 So why are we here today? Purpose of
17 today's session. Present the NPRM proposed
18 changes to 25 CFR 170, listen to and record your
19 comments and concerns. Also take any letters or
20 any other documentation you wish to submit to us,
21 and we'll include those in the record as well.

22 With respect to the work and effort

1 that took place in the development of 25 CFR Part
2 170 more than 10 years ago, only the following
3 are included in the NPRM: Statutory changes,
4 updated operational procedures and policies that
5 the IRR/TTP Coordinating Committee developed and
6 passed by consensus that were ultimately approved
7 by the Secretaries of the Department of the
8 Interior and the Secretary of Transportation.
9 The program and the reason why there's two is the
10 program is jointly administered by DOI and
11 Federal Highway.

12 OMB has changed some rules with the
13 Federal Register regarding what is allowed in a
14 rule. So you may have noticed that we have
15 removed information that can be considered to be
16 sort of information only or reference material.
17 That was something that -- it shortens the rule,
18 but in some ways, in my personal view, it makes
19 it a little harder to find stuff. But on the
20 other hand, I think it is a sensible rule from
21 the Federal Register's perspective I think
22 because standards, things of that nature can

1 change.

2 And if you think about it, the current
3 rule has been in effect now with some
4 modifications by statute for over 10 years. And
5 if you think about 10 years ago, maybe there are
6 various Federal Highway construction standards or
7 other things have changed. And clearly the way
8 the program is administered and the order has
9 changed. So those kinds of references being on
10 Web sites, that's something that is easier for us
11 to update and have available for tribes as a
12 reference.

13 MR. GLAZE: Good morning. Can I make
14 a comment or a question on that point?

15 MODERATOR CAULUM: Sure. Introduce
16 yourself.

17 MR. GLAZE: This is Jim Glaze with the
18 Sonosky Chambers Law Firm. Do you need the last
19 name spelled?

20 MODERATOR CAULUM: Please.

21 MR. GLAZE: Yes? G-L-A-Z-E. Just
22 some history on that. I was involved with the

1 negotiated rulemaking and one of the core
2 principles that the tribal representatives on the
3 Negotiated Rulemaking Committee had was that they
4 wanted the rule to be very comprehensive and kind
5 of a one-stop-shop where it was easy for tribal
6 officials running programs to see the information
7 rather than having cross-references to this
8 document or that document in other places.

9 And so, one comment in our -- we
10 prepared a memorandum on this and one comment
11 that we've -- asking for tribal leaders to think
12 about or comment on is one principle that the
13 agencies or departments could have in this is not
14 to change anything that was brought together by
15 consensus among tribes and federal officials
16 unless it's compelled because the law has changed
17 or because it's beneficial to tribes.

18 And so these kind of changes in the
19 rule where they're taking out information that
20 was researched very heavily by the committee
21 members and put in there to help tribes have an
22 easier access to information -- rather than just

1 having things on Web sites that can be changed
2 unilaterally by federal agencies, having it
3 locked into the reg gave them some security that
4 this was information they could rely on, they
5 knew where it was.

6 So even though I get kind of the
7 theoretical principle that you don't want to have
8 informational rules because they can change, in
9 negotiated rulemaking where tribes are
10 government-to-government negotiation I think it's
11 not a good principle to have the Federal
12 Government take things out of a rule that are not
13 compelled because the laws have changed. So
14 that's just one comment I want to make here.

15 Thank you.

16 MODERATOR CAULUM: Thank you. And
17 that is actually -- to be blunt, when we were
18 told that that stuff has got to come out, one of
19 the first questions I asked was related to that.
20 And I was told that that's essentially the
21 Federal Register's view of the world is
22 informational stuff that is not specific to the

1 actual rule, that is effectively reference
2 material. Their view of the world now is that
3 use links for where that information is
4 available.

5 And then I'm thinking about it from a
6 practical perspective. I don't know that all of
7 you -- well, I imagine many of you have the
8 actual printed rule available, in some cases
9 maybe more handy than going online for it,
10 especially depending on where you are at a
11 particular moment. And I think that that sort of
12 attention between where the Federal Register is
13 -- which we have to keep in mind the Federal
14 Register is run by ultimately the President, and
15 so he's in charge of our world as well. And so
16 we are sort of -- we're beholding to that.

17 And on the other hand, I certainly
18 respect Jim's view that this is information that
19 tribal representatives and the government
20 specifically put in the current rule as a result
21 of negotiated rulemaking. That is something I
22 briefly want to touch on as well.

1 When we were going through the draft
2 and then we were doing the NPRM, that is
3 something that we kept foremost in mind, was that
4 the original rule was a result of a negotiated
5 rulemaking process. The assistant secretary made
6 the determination that for the purposes of
7 updating the rule to comply with current law and
8 basically operational practices that it would not
9 be an appropriate candidate for a negotiated
10 rulemaking process, but we felt as though also
11 the input of the Tribal Transportation Program
12 Coordinating Committee was obviously really a
13 critical aspect of putting together the draft as
14 well as talking about the comments that we got on
15 the draft to get us to the NPRM. However, that
16 is not a substitute for formal consultations, and
17 that's why we're here today.

18 But like I said, I think it is
19 important to keep in mind that what we tried to
20 do was stay as close to the negotiated rule as we
21 could while also updating it to reflect today's
22 reality. And I hope we get good comments on

1 whether we managed to do that or not as we move
2 forward in the process.

3 Last, the use of appendices, you may
4 have noticed, has also been minimized and much of
5 the information, as I mentioned earlier, will now
6 be available on BIA and Federal Highway Web
7 sites.

8 Going to the preamble, the preamble
9 provides the background of -- an overview of the
10 history of 25 CFR 170 since its publication in
11 July 2004 including the laws that have been
12 passed that have affected the Indian Reservation
13 Roads Program, otherwise known as now the Tribal
14 Transportation Program. And we've been over
15 those earlier on, especially 221 and SAFETEA-LU.

16 Efforts that took place to clarify
17 policies and procedures that were established.
18 It describes the consultation session location,
19 schedules and agenda. Explanation of proposed
20 revisions that are contained in each subpart of
21 the NPRM, and other informational and procedural
22 requirements publishing an NPRM.

1 You may have noticed, if you happen to
2 have a copy of the current rule that was
3 published on July 19, 2004, there's a long
4 preamble to that rule and it discusses comments
5 that were made and the federal response to those
6 comments. When we get to the final rule, you're
7 going to see a preamble that has that information
8 in it. In the NPRM it is, as this mentions, more
9 of an overview and general description of the
10 areas that were changed.

11 And since we did -- it's a little
12 different when you're doing rules involving
13 tribes because typically in other rulemaking you
14 don't have the draft process and consultation on
15 a draft. That however is a really important
16 tool, in my view, for tribes and for us in the
17 Government in that while we're working through
18 the draft rule process and consulting on that, we
19 have control really, in my view, with tribes over
20 the back and forth in that process. Once the
21 NPRM is actually published, we lose a great deal
22 of control because now this process is much more

1 formalized.

2 And so we're in the proposed rule
3 process here. As I said, there's an overview.
4 Then once we get the comments in and we begin
5 addressing those as we move toward publishing the
6 final rule, you'll see some more detailed --
7 you'll see a lot more detailed responses to
8 comments in the final rule.

9 Also, the preamble for the final rule,
10 for some reason there's a dispute. A lot of
11 times courts will look at that to see whether the
12 agency has provided a reasoned explanation for
13 why they decided to go a certain way in the final
14 rule.

15 Okay. And then in the preamble, what
16 is this NPRM? In broad overview the NPRM revises
17 and updates 25 CFR 170 to comply with legislation
18 governing the Tribal Transportation Program,
19 reflect changes in Tribal Transportation Program
20 delivery options that are available to tribal
21 governments. As I alluded to earlier, since 1998
22 I think many of you would agree that the way the

1 Tribal Transportation Program has delivered has
2 changed dramatically. Tribes can still have the
3 program delivered by direct service, and many do.
4 But with the advent of tribes being able to
5 contract directly with Federal Highway, I believe
6 there's now over 130 tribes who currently
7 contract with Federal Highway directly for all of
8 the inherent federal functions of the program.

9 In 2011, or 2010 or 2011, I forget
10 which, BIA developed a program agreement as we
11 call, which is akin to the Federal Highway
12 Agreement, and there are now about 150 tribes
13 altogether that contract with BIA under what we
14 call a program agreement. So they are also
15 carrying out the inherently federal functions of
16 the program.

17 Well, if you add that up, that's now
18 become possibly the majority of the 566
19 federally-recognized tribes throughout the
20 country are now taking the program and
21 administering it largely themselves except for
22 the inherently federal functions, which since --

1 I mean, I don't know that -- I wasn't involved in
2 the program in 1998, but I'm not sure that many
3 could have imagined that this program -- the way
4 the program is delivered and the way programs are
5 administering it -- there are tribes now
6 administering it for themselves -- would have
7 changed so dramatically.

8 We also are -- in this NPRM we're
9 making technical corrections to clarify program-
10 related responsibilities and requirements for
11 tribal governments, the BIA, Federal Highway
12 Administration. We're clarifying the
13 requirements for proposed roads and access roads
14 the tribe requests to be added to or remain in
15 the National Tribal Transportation Facility
16 Inventory, formerly known as the IRR Inventory.
17 And remove certain sections of the current rule
18 that were previously included for informational
19 purposes only while directing the reader to
20 Federal Highway or BIA Web sites for the most
21 current information that is available.

22 Consultation sessions that I mentioned

1 earlier besides here will be held in Phoenix on
2 January 15th. That's this coming Thursday. Two
3 weeks from today we'll be in Minneapolis. Two
4 weeks from this coming Thursday we'll be in
5 Oklahoma City. February 10th in Anchorage and
6 February 12th in Seattle. As I mentioned earlier
7 also, it will be the same presentation at all
8 those locations as we're giving here, but you're
9 welcome to join us at any one of those locations
10 if you wish to do so.

11 And then preamble for written
12 comments. Comments on the NPRM must be submitted
13 by March 20th, 2015, which is approximately 30
14 days, or just over 30 days after the last
15 consultation session. You can send those via
16 email to consultation@bia.gov, and please be sure
17 to include the number 1076-AF19 in the
18 submission. You can mail them to Liz Appel at
19 the Office of Regulatory Affairs in Washington.
20 You can also go to the federal rulemaking portal
21 at www.regulations.gov, and the rule is listed
22 under Agency name BIA, and it's assigned up to

1 your docket ID. Or you can hand deliver them to
2 us, to Ms. Appel at the BIA.

3 Does anybody have any questions?

4 MR. EMAMI: Yes, would you repeat
5 again -- you said --

6 MODERATOR CAULUM: Your name, please?
7 Sir, your name?

8 MR. EMAMI: Jalal Emami.

9 MODERATOR CAULUM: Come up to the
10 microphone, please.

11 MR. EMAMI: Jalal Emami, construction
12 engineer.

13 MODERATOR CAULUM: Could you spell
14 your last name for us, please?

15 MR. EMAMI: E-M-A-M-I.

16 MODERATOR CAULUM: Okay.

17 MR. EMAMI: You mentioned 566 tribe,
18 federally-recognized. How many were -- you said
19 120 were -- had an agreement with the Federal
20 Highway director.

21 MODERATOR CAULUM: Over 130 --

22 PARTICIPANT: Hundred and twenty-

1 eight.

2 MODERATOR CAULUM: Oh, okay.

3 MR. EMAMI: Hundred twenty-eight?

4 MODERATOR CAULUM: Hundred and twenty-
5 eight currently contract direct --

6 MR. EMAMI: Twenty-eight with the
7 Federal Highway?

8 MODERATOR CAULUM: Federal Highway
9 Administration.

10 MR. EMAMI: How many came to BIA, the
11 total number?

12 MODERATOR CAULUM: BIA has --

13 MR. EMAMI: Based on the G-to-G
14 agreements.

15 MODERATOR CAULUM: BIA has I believe
16 about 150 tribes with --

17 MR. EMAMI: Up to --

18 MODERATOR CAULUM: Yes, with --

19 MR. EMAMI: Hundred fifty.

20 MODERATOR CAULUM: -- G-to-G
21 agreements.

22 MR. EMAMI: Now the difference between

1 the two agreement directly with the Federal
2 Highway and BIA, well, the BIA will offer
3 technical assistant to all the tribes beside the
4 agreement?

5 MODERATOR CAULUM: Yes, the --

6 MR. EMAMI: Does the Federal Highway
7 do the same under the same agreement?

8 MODERATOR CAULUM: The agreements are
9 nearly identical in many of their -- the ways the
10 agreements are structured and the provisions of
11 the agreements. Federal Highway offers technical
12 assistance, as well as BIA. That's not --

13 MR. EMAMI: That's the identical --
14 the same thing?

15 MODERATOR CAULUM: Largely the same.
16 So, but today that's not the subject of our
17 consultations. That's simply a reference to the
18 way the program is delivered to tribes.

19 MR. EMAMI: Well, I was just wonder
20 about these numbers that is increasing.

21 MODERATOR CAULUM: Okay. Very good.

22 MR. EMAMI: Thank you.

1 MODERATOR CAULUM: Thank you. Anybody
2 have any questions? All right. Oh.

3 MR. SPARROW: Could anyone who did not
4 introduce themselves, please stand, please, and
5 introduce themselves?

6 (Introductions)

7 MS. PHILBIN: And all of you please
8 make sure, our recent introductees, that you sign
9 in on the sign-in sheet.

10 MODERATOR CAULUM: Thank you very.
11 much.

12 MR. GISHI: Good morning, everybody.
13 Can you hear me?

14 (No audible response)

15 MR. GISHI: Thank you. Thank you for
16 coming. As Andy indicated, this is great. We
17 got a good turnout here. A lot of this, of
18 course obviously you know, has been in the making
19 for a number of years. Ever since 1998 when T-21
20 first became law, it required the Bureau to
21 develop regulations and a funding formula
22 utilizing a Negotiated Rulemaking Committee.

1 That began the process of really involving tribes
2 and having input into the process. And as Jim
3 indicated, I've been working with Jim now, my
4 goodness, for -- since 1998 in a lot of areas.
5 And it really brought home to -- certainly as an
6 agency what needed to be done and involve tribes
7 in this process. And we're continuing to do
8 that. And hopefully through this NPRM you'll
9 begin to see a lot of what's in there are things
10 that were developed as part of that process.

11 We encourage you also -- because it is
12 a Notice of Proposed Rulemaking there are aspects
13 of it that we certainly would like to get your
14 comments on. Not everybody agrees with what came
15 out of the negotiated rulemaking in terms of some
16 of the issues that -- some of those things have
17 expired. Here's the opportunity to have input
18 into that process. And so we certainly welcome
19 that.

20 I'm going to take care of Subpart A.
21 Subpart A -- and as you go through the different
22 subparts you'll begin to see that they pretty

1 much follow what is actually in the regulations
2 currently. The format that we've developed here
3 is is we're going to go through each one of the
4 sections that we have and pretty much identify
5 what's there, that's there for you to be able to
6 read. And like I say, if there are questions
7 specifically that come up, please at least raise
8 your hand, and if we have an explanation that
9 might be coming a little later, we'll let you
10 know on that.

11 Important thing to note here is that
12 the big changes as part of policies, the
13 applications and the definitions are primarily
14 geared toward those things which have either been
15 developed through SAFETEA-LU or through MAP-21.
16 So keep that in mind.

17 One of the big areas of course is in
18 170.1. And as you begin to see this, how this is
19 developed, it includes DOT as a partner in the
20 delivery. Prior to this in the previous
21 regulations DOT, Federal Highways was primarily
22 the oversight agency. They were the guys that

1 were basically -- they had the money, they made
2 the rules, they made sure to comply with
3 everything they needed to do. The BIA Office of
4 Self-Governance and the tribes were the
5 implementation of the program. And you'll begin
6 to see in this regulation how now Federal
7 Highways is now -- has to kind of wear the two
8 hats, not only the oversight agency, but also an
9 implementing agency in terms of entering into
10 direct agreements with tribes. And so, that was
11 what was mentioned earlier. That's one of the
12 big changes you'll see.

13 It also adds as a part of this long
14 list of type of agreements that we had. Subpart
15 J under self-determination. Subpart K for self-
16 governance. And of course our other -- the
17 agreements that we have that were FAR-based,
18 based on the Federal Acquisition Regulations. It
19 included as part of SAFETEA-LU and subsequent
20 actions two other specific type of agreements
21 which we utilize, and those are the program
22 agreements that are developed through Federal

1 Highways and other appropriate agreements which
2 we continue to utilize.

3 Many of you have been -- may have been
4 involved. I know in California we've had a
5 number of tribes where we've actually developed
6 under that context of other agreements mechanisms
7 which allowed us through the authorities that we
8 have under Title 25 and working with our
9 solicitor's office the ability to develop
10 agreements that sometimes were a little difficult
11 if we were going to solely do them utilizing
12 Title 23. And we're now trying to catch up with
13 that process. As you go through this you'll
14 begin to see where those have application, where
15 those type of agreements have come full circle
16 and now are going to be considered not
17 necessarily just part of Title 25, but also are
18 being referenced in Title 23.

19 170.2 eliminates the reference to the
20 BIA Road Maintenance Program. We do have road
21 maintenance activities that are in the
22 regulations. They're more broadly interpreted to

1 reflect the TTP Program, but those of you who are
2 out there doing road maintenance activities know
3 that the activities themselves are pretty
4 straightforward. And we tried not to get into
5 the details of you'll have this much cover over a
6 pipe if you do a certain type of surface road.
7 It's more in those areas of utilization of funds,
8 what's eligible, what is made available. And
9 that's really different for the TTP Program
10 simply because it is a TTP Program.

11 One of the big things of course, as
12 Andy mentioned, is the allowable use of funds not
13 just for 25 percent of the funds made available,
14 but also up to \$500,000. This changed from
15 SAFETEA-LU. MAP-21 allows us to be able to do
16 that. So technically a tribe who receives
17 550,000 or 500,000 can utilize all of their funds
18 to do road maintenance. And we see that a lot in
19 some cases out in the field now.

20 It updates contact information for
21 those wishing to comment. It also talks a little
22 bit about the burden of estimating for the

1 purpose of information collection. If you'll
2 note in the Federal Register notice there's a
3 separate date and a timeline if you're going to
4 comment on the information collection aspects.
5 There are certain parts of the regulations that
6 will require the public a certain amount of
7 effort and time to collect information. And this
8 has all been estimated as to what that is, what
9 those sections are and you have an opportunity
10 now to comment on that.

11 Keep in mind that comment period
12 actually closes before the March 20th comment
13 period. That's actually handled by a whole
14 different part of the Department of Interior and
15 not the Indian -- the TTP. Every time I say
16 that, I owe people a dollar. So I got to make
17 sure to stay away from IRR, Indian Reservation
18 Roads.

19 It also adds the definitions. You'll
20 see the list of definitions. Some of those are
21 very much specific to the TTP Program. Some of
22 them are of course repeats that have been just

1 clarified again for operational purposes that are
2 in there. Be sure to take a look at those. We
3 tried to make sure we included those in.

4 The big ones of course that we see in
5 there are the National Tribal Transportation
6 Facility Inventory as applies to the facility
7 inventories, how they're all related to the BIA
8 system, the tribal system and the TTP systems as
9 a whole. Gives you a little bit of an overview
10 of that.

11 Next one? Yes, we covered this part.

12 Okay. It does remove a couple of the
13 definitions previously included in the IRR
14 Program Construction Funds. As most of you know,
15 the whole concept of -- prior to the 2004
16 regulations everything was either construction, a
17 program, or planning, basically, and the bridge
18 stood off on its own off to the side. What we
19 did as part of the 2004 rulemaking is the
20 Rulemaking Committee just took everything, went
21 through -- as Jim has indicated, there was a lot
22 of research that went into it, and there was. We

1 went through and we identified everything that
2 was eligible under Chapter 1 of Title 23 and we
3 basically said how can we now put this into our
4 regulation as being an eligible activity?

5 And so the result of that was is we
6 started going away from basically saying this is
7 just a construction program. It became more of a
8 transportation program which had eligible
9 activities that tribes had the flexibility to
10 then apply based on the needs that they have,
11 which are very unique, as you may know, across
12 the board, across the country, at every location.

13 Office of Self-Governance in terms of
14 -- that's just basically -- it's referred to in
15 terms of the type of agreements, but the
16 definition was taken out of there and referred to
17 either as Department of Interior programs or
18 Department of Transportation programs when we
19 refer to those.

20 Okay. Next one? We've got a table
21 here that basically looks at what replaces what.
22 What's in the existing 25 CFR as it's published

1 today and what is within the NPRM. The IRR
2 obviously is -- Indian Reservation Road itself is
3 changed to Tribal Transportation Facility. This
4 was a big part of the name change, as well as a
5 lot of the references in statute.

6 The IRR Bridge Program, of course we
7 know all those -- that it's now referred to the
8 Tribal Transportation Facility Bridge Program.
9 And a number of them. Anything referencing the
10 IRR Program, if it continues to exist under the
11 TTP Program of MAP-21, it has been changed to
12 those specific identifiers within the NPRM.
13 And there may be some changes relative to the
14 actual program description, and that's why it's
15 important for you to take a look at those.

16 Yes, Tom?

17 MR. SPRINGER: Hi, I see you're
18 getting done with Subpart A, the --

19 MS. PHILBIN: Excuse me.

20 MR. SPRINGER: Oh, I'm sorry. Tom
21 Springer, S-P-R-I-N-G-E-R, with Ho-Chunk Nation.
22 I see you're getting done with Subpart A, so I

1 wanted to bring this up. I don't know if you
2 planned on addressing this at some point during
3 the presentation, but the newly-created
4 definition of "access road," I was wondering you
5 could explain how the BIA plans to implement that
6 new definition. Ho-Chunk Nation, as well as many
7 tribes I assume in California here, a lot of the
8 rancherias, would have roads on their inventory
9 that are outside of tribal boundaries, and that's
10 part of what an access road is. So I was hoping
11 you could explain how the BIA plans to implement
12 that and the effect that it will have on tribes.

13 MR. GISHI: Okay. Thank you, Tom.

14 What Tom mentioned was is there's a
15 number of issues that came up over the past few
16 years working with the Coordinating Committee,
17 and this was a very big issue in terms of how it
18 impacted the inventory. And the inventory
19 essentially at that point was basically driving
20 the funding formula, so everybody was very
21 concerned about how access roads would be
22 defined.

1 And, Tom, just so you don't have to
2 keep standing there, when we get to that part,
3 we'll make sure we talk about that as one of the
4 major changes as to how it came about. And so, I
5 want to make sure that we get through this part.
6 But that's an area that Mr. Kipp will be able to
7 explain also. Okay?

8 MR. SPRINGER: All right. Thank you.

9 MR. GISHI: Thank you. And that's a
10 good point. If you have questions of something
11 that you know is coming up, if you bring it to
12 our attention, we'll make sure that we emphasize
13 a little more time on that when we get to that
14 part.

15 So essentially that's Subpart A.
16 Obviously you can come back to it if you have any
17 questions on that, but it's fairly
18 straightforward. It identifies the policies, the
19 application and kind of what the changes are and
20 how the program is to be implemented.

21 As many of you know, unlike a lot of
22 programs out there, this is one very unique

1 program because all the funds that come into the
2 TTP Program come through Congress, through the
3 Federal Highway Administration, through USDOT.
4 They are the -- we refer to them as the parent
5 agency, the oversight agency. We are an
6 implementing agency. We have an agreement with
7 them that helps us to do that, go through that
8 process.

9 And you'll begin to see how this whole
10 relationship is starting to gel, if you will, as
11 a result of some of the things like the National
12 Business Plan, the policy guides that are out
13 there, and working with the Coordinating
14 Committee and how that whole process works and
15 being able to bring issues forward and address
16 them in between these major periods of when we're
17 doing a rulemaking.

18 So, go ahead, Sheldon. Okay. The
19 Tribal Transportation, the program, the TTP
20 Program Policy and Eligibility. We had -- a big
21 part that was part of our rulemaking back then
22 was the three Cs: consultation, collaboration and

1 coordination. Most of that has been -- continues
2 to be in place. Obviously the major changes
3 would be reference to the names, the agreement
4 types, including Federal Highways in as a
5 implementing partner with the tribes.

6 And basically there's a portion in
7 there that 101 talks about developing plans and
8 projects for safety. If you look at part of the
9 consultation process and MAP-21, Congress in
10 implementing the statute has required the
11 Secretary of Transportation to do certain things
12 and has required the Secretary of the Interior to
13 do other things. And so those roles, we have to
14 kind of go through and read MAP-21 and figure out
15 what that is.

16 As Bob indicated, the Safety Program
17 is one of them where it is handled. Basically
18 the availability of funds, the procedures on
19 developing, obviously in consultation with a
20 tribal work group, as well with the Bureau of
21 Indian Affairs, is actually the responsibility of
22 the Secretary of Transportation. So from that

1 standpoint there are a number of things in here
2 that the TTP Policy and Eligibility tries to
3 delineate and show you where that is. Because in
4 some cases DOT is doing that. In other cases the
5 Secretary of the Interior is handling that, also.

6 Then obviously the ones down -- 102,
7 101, 103. Just as a note, if you look at the
8 table of contents at the very beginning of the
9 regulation, we do have a 101, a 102, a 103, but
10 in the actual body of the reg there's two 103s.
11 The first one is 102 and the second one is
12 actually 103. And that's something that will be
13 corrected, but when you're referencing those, if
14 you've got questions or comments on those, make
15 sure you reference not only the section, but also
16 what the topic is so that way we can make sure
17 that we follow. And we probably will be able to
18 follow once we take a look at it, but something
19 good to note is one of the errors in the
20 publication of the regulation. But as I
21 indicated, the table of contents is correct.
22 It's just when you get to the body where it was

1 not changed.

2 No significant changes through the
3 remainder of most of those. Primarily reworded
4 for clarification purposes, again those portions
5 that refer to Federal Highways and the type of
6 agreements and so forth.

7 The changes. In 109, the change is
8 "state and local government officials shall work
9 with tribes" to "will work with tribes." Again,
10 this is one of the areas where the wording, the
11 use of the words "shall," "will," and "must" are
12 things that we worked through our regulatory
13 people with also.

14 One-ten. No changes there.

15 Next one? Eligible uses of TTP funds.
16 When we get to -- we reference in here the
17 Section 202(a) has a new definition. If you
18 recall, in the old regulations and in the old
19 statute there was a number of ways of expressing
20 what eligible activities that were -- primarily
21 as it was related to the type of contract
22 activities that were eligible. It was in the

1 contract section. That has been reworded and for
2 the most part some of that information has been
3 -- is definitely included, but it was moved up to
4 202(a)(1). And that basically is the definition
5 of eligible activities for the TTP Program. Very
6 important because sometimes people ask what is it
7 that -- can we do this? Well, that's a very
8 broad definition, but it does specifically state
9 what activities are eligible under the TTP
10 Program.

11 It also references in Appendix A -- it
12 provides a little more clarification. This is
13 something that was one of the appendices that we
14 were able to keep in there because we were
15 referring to the -- not only OMB, but also the
16 Department that this is a -- references to
17 activities that really need to be in there as
18 part of the regulation because it specifically
19 states what is eligible. And that's why we were
20 able to keep this part of it in. We reduced the
21 other appendices and some of them, as Andy
22 mentioned, were moved to the Web sites.

1 We delete references to the
2 maintenance activities from the list of
3 ineligible activities, because back in 2004 it
4 was and ineligible activity. In 2005 it became
5 an eligible activity, and then it was clarified
6 even more under the -- both SAFETEA-LU and MAP-
7 21. So that was removed for that purpose.
8 That's one of the areas that we always had to
9 make sure we reminded people that during that
10 time after 2004 that it was an eligible activity.

11 Clarification on the purchase of
12 construction or maintenance equipment and how it
13 must be approved. There's a cost analysis
14 associated with that.

15 One-thirteen clarifies the process by
16 which proposals for new use of Tribal
17 Transportation funds must follow. The addresses
18 were updated I think since this was put out.
19 Federal Highways moved from over there near the
20 L'Enfant Plaza in D.C. out to -- by the ballpark.
21 So the result of that is -- and of course our
22 offices have changed also. We've moved from one

1 building to another since then. Actually, we
2 moved from one building across the street back to
3 the same building. So those have all been
4 updated to reflect those new addresses.

5 And then of course the new uses. This
6 is one of those where we've been told we need to
7 post the new uses of the use of TTP funds on the
8 FHWA and BIA Web sites.

9 Yes, Jim?

10 MR. GLAZE: Yes, it's Jim Glaze,
11 Sonosky Chambers Law Firm, G-L-A-Z-E. Just going
12 back to the construction, the addition of the
13 regulation about construction and maintenance
14 equipment not being eligible unless approved by
15 BIA and Federal Highways, my recollection is we
16 worked very hard to make that easy process for
17 tribes, and this seems like it's stepping back to
18 have more federal control over -- I understand
19 that in these agreements there's an idea that you
20 want to do a cost benefit analysis to see if it's
21 -- if you're going to be using the equipment
22 enough that it makes sense to buy it rather than

1 leasing it short term, but that change doesn't
2 seem to be mandated by federal law or anything.
3 It seems to be taking away authority from tribes
4 and giving it to the federal agencies. So I'm
5 curious why that was added when it wasn't
6 required and it wasn't part of the first
7 negotiated rulemaking.

8 MR. GISHI: This was something that
9 was added right about the same time we got into
10 ARRA, the Recovery Act, and it was one of the
11 areas that -- not necessarily a result of the
12 Recovery Act, but just having -- and if you've
13 ever seen that, Jim -- I don't know if you've
14 seen that form; some of you have, it's fairly
15 straight. Give you some indication, none of the
16 equipment purchases that have been requested have
17 been denied. But what it does is it allows a
18 process for people to go through and do a self-
19 evaluation of what they need for the very purpose
20 that you're looking at. And that's kind of what
21 we're looking at. It's not necessarily basically
22 -- obviously a lot of what controls the program

1 is there. The funding-wise in particular is a
2 big area of what that's identified.

3 A lot of discussion does happen up
4 front. Certainly from that standpoint it is --
5 the intent of it is to be able to continue to
6 keep things moving and allow for the use of the
7 equipment to be able to do that. And the
8 previous one that we had, actually the 2004, the
9 only equipment that it allowed was equipment that
10 was associated with surveying, engineering, GIS-
11 type stuff. And everything else since then has
12 now kind of moved into that arena of the
13 equipment.

14 MR. GLAZE: Well, I agree that this --
15 I realize that this was a big topic back in the
16 Neg Reg and there was a question of what was
17 allowable for purchase, but it seemed like after
18 SAFETEA-LU there was a lot more liberal
19 understanding what could be purchased. And
20 tribes actually do need to and do purchase
21 equipment quite often.

22 And you say -- I agree that it seems

1 like it's a fairly easy step to get approval from
2 BIA and Federal Highways, but the way -- when you
3 read this, I just think the comment is -- it says
4 -- this is listed under what are not allowable
5 costs, or allowable activities. And it says
6 purchase of a construction and maintenance
7 equipment unless approved by BIA and Federal
8 Highways as authorized under this other section.

9 And to me that is -- particularly when
10 you put into hard black and white regulation,
11 what that's going to tend to do is make it more
12 difficult. It's going to start looking like this
13 is a hard process and that the default is no.

14 And I really do think that that's something that
15 should be looked at carefully and that what
16 should be -- the way that this should be worded
17 is that tribes may purchase construction and
18 maintenance equipment working with Federal
19 Highway to ensure that it meets the cost benefit
20 analysis, or something where it's promoting or
21 allowing that in a more positive way, rather than
22 this kind of negative default.

1 So I think that could actually be a
2 step backward from tribal authority in the
3 program if you leave it the way it is right now.
4 I guess that would be my comment.

5 MR. GISHI: Thank you. Very good. I
6 appreciate that.

7 Subpart B. The second one. There you
8 go. Okay. The next slide. There you go. I
9 apologize.

10 MR. GEISLER: Mr. Gishi?

11 MR. GISHI: Please, go ahead.

12 MR. GEISLER: Secretary Adam Geisler,
13 La Jolla Band of Luiseno Indians, G-E-I-S-L-E-R.
14 I realize this is a consultation. It looks like
15 we're going one by one through each section, so
16 if this is the appropriate time, I'm going to
17 raise it. But I want to echo what the gentleman
18 said about the construction and maintenance
19 equipment acquisition.

20 A lot of conversations that we have
21 internally in working on a government-to-
22 government relationship with the State of

1 California is we always ask that question, how is
2 the state treated when you work with other
3 states, or in this case how is the Federal
4 Government treating other states when dollars
5 funnel down to them?

6 I think what tribes are looking for is
7 a parallel treatment in a lot of ways, and
8 sometimes better treatment in the way that our
9 relationship exists with Federal Highways, BIA,
10 DOT, etcetera.

11 And so the question I have; and I
12 don't know the answer to this, but I'm assuming
13 that for an example formula dollars that the
14 State of California receives is this type of a
15 rule being imposed upon them and the State of
16 California's ability to acquisition equipment?
17 Do they need to go through Federal Highways and
18 some type of means testing?

19 Granted, you're right, nobody's ever
20 been denied, but why would we leave the window
21 open for that's now to happen if the intent of
22 this program is for us to run our own maintenance

1 -- or, excuse me, for us to run our own
2 transportation programs, because we intimately
3 understand what our needs and uses are?

4 So to put that upon Federal Highways
5 or BIA, DOT or anybody else, it kind of is
6 frustrating because -- I mean, and, please, I
7 mean this in no offense, but folks in Washington,
8 D.C. don't understand the issues that I'm dealing
9 with on La Jolla Indian Reservation. And so, if
10 there's a need for me to do a purchase of
11 equipment, I should have the flexibility to buy a
12 piece of equipment, no different than any other
13 state or municipality has the ability to do that
14 without having some kind of process we go through
15 in order to do that. It just seems like there's
16 a secondary approval needed that really takes
17 away from a tribe's ability to exercise its
18 sovereignty over dollars that it has. Thank you.

19 MR. GISHI: Thank you. Bob, you have
20 a comment?

21 MR. SPARROW: I'm Bob Sparrow,
22 director of the Tribal Transportation Program.

1 The issue that's been raised initially with Mr.
2 Glaze; and I greatly appreciate it, is he is
3 correct, in the 25 CFR 170 that was published in
4 2004 when none of us had gray hair back then, it
5 does say the purchase of maintenance equipment is
6 an allowable use of the -- for the BIA Road
7 Maintenance Funds. That was an allowable use of
8 those fundings.

9 Those funds are not Title 23 Highway
10 Trust Funds. Federal -- and I don't have the
11 exact citation, but we'll try to make sure that
12 we cover this when we publish this out. We will
13 review this comment again. The federal funds
14 that are provided -- the Highway Trust Funds that
15 are provided to the states I don't believe can be
16 used to purchase construction equipment. That
17 has to come from the state funds. Okay?

18 What we're clarifying here is -- and
19 maybe one of the things we need to do, Jim,
20 besides reword that; and we'll take a look at
21 this, but it's remove the term "maintenance,"
22 because it is listed as an eligible activity.

1 But when it comes to purchasing
2 construction equipment, that's -- or non-
3 maintenance equipment, that is where we have
4 asked for a cost benefit ratio of leasing that
5 equipment versus purchasing the equipment.

6 Go ahead.

7 MS. PHILBIN: Excuse me. To both
8 gentleman, you, sir, and Mr. Glaze -- Vivian
9 Philbin speaking -- I believe the similar -- I
10 don't have the citation in front of me. We will
11 find that. A similar cost benefit analysis is
12 also required under the FAR and under the common
13 rule on expenditure of costs. So this wasn't
14 created out of the blue. There has to be -- it's
15 a balance, and as both Mr. Gishi and Mr. Sparrow
16 have said, there's never been a no, but there has
17 to be a justification for purchasing versus
18 leasing equipment.

19 MR. GEISLER: We could probably go
20 back and forth all day, but I'm just going to
21 come back -- Adam Geisler, La Jolla Band of
22 Indians, G-E-I-S-L-E-R. I think I'm just going

1 to come back to the fact that we know what our
2 need is. And so I think what we're asking for,
3 at least what I'm asking for on behalf of La
4 Jolla is is if the flexibility is there for us to
5 be able to purchase our equipment, we're not --
6 we'd appreciate not having to go through a
7 secondary level in order to do that. If it's an
8 eligible activity that's already been discussed
9 that's unique to this program, then let us do
10 that. But I understand that there's probably
11 some homework and diligence that needs to be
12 done, because like I said, I don't know the
13 answer to that, but that is my question.

14 And as I also said, sometimes we want
15 to be treated as states, but sometimes we want
16 better treatment in respect to the sovereignty
17 that we're trying to exercise. So I appreciate
18 your comment. Thank you.

19 MR. GLAZE: And just to add to what
20 the secretary said, I think that the -- it goes
21 back to Andy's comment about, well, when OMB and
22 Federal Register, they look at these things, they

1 try to do kind of a one-size-fits-all. Well,
2 this is the way we do it for everybody else. The
3 challenge whenever you're developing Indian
4 policy and tribal policy in the Federal
5 Government is it's not like everybody else.

6 The tribes have a unique history.
7 They're sovereign. They're sovereign, but they
8 also don't have the power that states do to tax
9 and to push back and have representation like
10 states have. Tribes need not only policies that
11 are similar to states, as the secretary said,
12 they need policies to help them succeed.

13 And when you identify a place where
14 there's just a hoop you got to jump through with
15 the Federal Government when there's no absolute
16 statutory prohibition against this, which there's
17 not -- and I respect what Ms. Philbin said about
18 common rule and FARs, but the Self-Determination
19 Act is the principle of all of these things. All
20 these programs are either part of the Self-
21 Determination Act or at least in accordance with
22 the Self-Determination Act and they say that the

1 FARs don't apply and they say common rule doesn't
2 apply. And the idea is you want to allow tribes
3 to have the maximum amount of flexibility to make
4 their own decisions, self-determination, their
5 own sovereign choices.

6 And the money that they get doesn't
7 grow. I mean, they have to live within a budget
8 every year based on what the formula says, so
9 basically trusting them to make that call
10 themselves. I think that would be a place where
11 you could make this rule improved from what it
12 was in the original rule by taking that out as a
13 -- given that it's not mandated by any statute
14 that I'm aware of, that would be an advance of
15 this rule where the tribes would have the power
16 to do that. You could put in the rule things
17 that they should consider before doing that, but
18 not having a federal overseer make the final call
19 on it. Might be a place where you could really
20 advance the rule beyond where it was.

21 Not to say -- I understand the
22 history. I understand what the program

1 agreements say about the cost benefit. That is
2 in these agreements. But I do think that that
3 comment that was made by the secretary is a very
4 good one, that why not move this forward and make
5 it one less bureaucratic step you have to go
6 through to make that decision as a sovereign
7 nation?

8 MR. GISHI: Thank you, Jim. Any other
9 discussion?

10 (No audible response)

11 MR. GISHI: If not, Tribal
12 transportation and cultural access roads.
13 Primarily this section talks about how the
14 facilities in the National Tribal Transportation
15 Facility Inventory must be open. They're public
16 roads. They must be open and available for
17 public use. It identifies also ways that we can
18 close them temporarily and how a facility would
19 be permanently closed in terms of those details.

20 And we've run into a number of
21 situations at different locations in which not
22 only was the tribe requesting it, and in some

1 cases it was a process in which -- is a case-by-
2 case basis, but this is here for that purpose
3 based on some of the issues that have come up in
4 the past. And it was in there before. It just
5 clarified a little more in detail obviously to
6 include TTP as well.

7 Most significant change is in 15 and
8 16. Seasonal transportation routes. Basically
9 it just combines the old version of 123 and 124
10 into particularly this one at 117 that are -- TTP
11 funds can be used for it. This is one of the big
12 areas that the Coordinating Committee was working
13 with over the past five, six years, particularly
14 in those areas where we're not normally used to
15 those type of facilities. Board roads, ice
16 roads, those type of facilities that are out
17 there. And again, we're talking about all
18 facilities, not necessarily roads. I think
19 that's one of the big areas that people -- we're
20 trying to get away from. And it's just referring
21 to the program, as far as an eligibility
22 standpoint, as roads, but transportation systems

1 in general that support and function in and
2 around tribal communities.

3 Clarifies the required design
4 standards to ensure health and safety. Of course
5 that's a big area that -- when you're -- some of
6 these particular systems are very unique and
7 different and making sure that we are complying
8 with health and safety standards for the public
9 as a whole.

10 The housing access roads. There's no
11 significant changes there.

12 Toll, ferry and airport facilities.
13 I think the one change we include here is again
14 referring to the FHWA program agreements was
15 added to the table. That's in there. And it
16 clarifies a particular instance how these funds
17 can be used for airport access roads and
18 maintaining airport facilities. And this is
19 important because this is an area that we've had
20 a lot of questions on and we try to provide some
21 clarification in there as to what are those --
22 what those eligible activities are in terms of

1 maintaining those things that support the
2 transportation access to the facility as opposed
3 to the actual paving of the runways themselves.

4 Recreation, tourism and trails. A big
5 part of what we're seeing out there is tribes
6 developing basically as part of their tourist
7 destination locations, being able to have an
8 infrastructure that supports that that can bring
9 visitors to those locations and make it not only
10 a pleasant experience, but also can enhance the
11 pride that the tribe has in those facilities that
12 it wants to share, not necessarily that in some
13 cases where the tribe may hold those things in a
14 different light than maybe the public does and
15 wants to keep them that way. This allows for
16 those areas of recreation, travel, tourism,
17 trails and how they are to be addressed.

18 Qualifies what funds that are out
19 there. Again, updating with the current programs
20 that there are. Most of you know that part of
21 MAP-21, there's a consolidation of a lot of the
22 programs. So some of the programs that were

1 readily accessible that you knew about prior to
2 this are no longer available, and in some cases
3 they've been rolled into other programs under
4 that heading. And so in those cases we tried to
5 identify, where we could, in the rule where that
6 applies.

7 We've had a continuous standing
8 regulation that's out there that we cannot build
9 roads in roadless and wild areas. And for Indian
10 Country that's only one location in the State of
11 Wyoming. So you don't have to worry too much
12 about that in terms of building roads out there
13 where roads are completely prohibited.

14 MR. BAILEY: LeRoy?

15 MR. GISHI: Yes?

16 MR. BAILEY: My name is Adam Bailey
17 from Hobbs Straus Dean & Walker. My last name is
18 B-A-I-L-E-Y. I have a question about 124. The
19 proposed rule had language in it indicating that
20 states could return funds to the Federal
21 Government and then the Federal Government could
22 then contract with those funds for tribes to use

1 those, but that was removed from this version. I
2 was wondering if you could talk about the reasons
3 for that.

4 MR. GISHI: Okay. We'd have to get --
5 was 124 in our previous rule, you say?

6 MR. BAILEY: Yes, it was 124(b).

7 MR. GISHI: In the draft?

8 MR. BAILEY: I think so, yes.

9 MR. GISHI: Okay. I'll have Bob look
10 at that and we'll get back to you on that.

11 MR. BAILEY: All right.

12 MR. GISHI: I think it might have been
13 rolled into these other areas that we're talking
14 about, but, Bob, can you check that for us?

15 MR. SPARROW: Yes, sir.

16 MR. GISHI: Okay. Highway safety
17 functions. Big part of what we're seeing. One
18 of the programs that continues to really be
19 emphasized is safety. And in particular most of
20 you know that part of the TTP Program was to make
21 sure that there was a -- safety activities were
22 eligible as a set-aside under the TTP Program.

1 This replaces this part of the highway safety
2 functions which were primarily geared toward the
3 safety program that was under Title 23, Chapter
4 1, and replaces those same functions that are
5 associated with the TTP safety funding set-aside
6 in MAP-21, which is described in 202(e).

7 Provides that funds be available for
8 safety activities. Describes the eligible
9 activities for safety funds. And pretty much
10 we've had some real good success. And Bob, who
11 does the update at the end of the consultation,
12 will give you an update on where the status of
13 the 14 funds are as well as the direction of 15,
14 primarily toward developing for tribes the
15 ability to develop a safety plan which then
16 allows them in many cases to be able to go out
17 and acquire other funds through the state
18 programs, other Federal Highway programs and
19 certainly through this program for any number of
20 the four Es that are out there: engineering,
21 emergency response, enforcement and education
22 purposes. And it also describes how a tribe can

1 receive or request non-TTP funding for safety
2 projects and activities. Again, very much
3 related to the program that's established under
4 Chapter 1 of the Title 23.

5 Transit facilities.

6 MR. BAILEY: Can I interrupt you one
7 second, LeRoy?

8 MR. GISHI: Yes?

9 MR. BAILEY: Can I interrupt you one
10 second?

11 MR. GISHI: Yes, interruption, please.

12 MR. SPARROW: You don't need to record
13 this. What section?

14 MR. BAILEY: I think it was 124.

15 MR. SPARROW: Okay.

16 COURT REPORTER: I'm sorry, I can't
17 hear you.

18 MR. SPARROW: No, no, you don't need
19 -- I'm just trying to get clarification I'm
20 looking up the right thing.

21 MR. BAILEY: 124.b. I don't know it
22 was in the old one. That's where it was.

1 MR. SPARROW: Were tribes trying to
2 seeking funding from a state?

3 MR. BAILEY: Yes.

4 MR. SPARROW: Okay. And what was the
5 question again?

6 MR. BAILEY: There was language in
7 there allowing the states to give money back to
8 Federal Highways that could then act as a pass-
9 through for tribes.

10 MR. GISHI: Where did it go if it went
11 somewhere and if it was taken out, why was it
12 taken out?

13 MR. BAILEY: Yes.

14 MR. GISHI: And that's basically what
15 you're asking?

16 MR. SPARROW: Oh, I got you. Okay.

17 MR. GISHI: Okay?

18 MR. SPARROW: I see it. Thank you.

19 MR. BAILEY: Yes.

20 MR. GISHI: Transit facilities. You
21 pretty much know that back in SAFETEA-LU a big
22 area actually under T-21 transit facilities

1 showed up as two very simple words in that long
2 paragraph if eligible activities. And then of
3 course the process of implementing it into the
4 program took a number of years. A lot of
5 coordination and a lot of direction from tribal
6 programs out there that they developed through
7 the years with states helped to kind of clarify
8 this.

9 And in recent under SAFETEA-LU there
10 was a Tribal Transit Program under the FTA. Then
11 of course there's -- we continue to have that as
12 one of our eligible activities. And so Sections
13 131 through 134 basically talk about the update,
14 particularly in this case the update to the
15 program under the DOT, the grant program that
16 talks about making funds available. It's a
17 formula-driven program, so it provides a little
18 bit of clarification.

19 This is one which because these funds
20 can be used directly as a match in coordination
21 with those funds it's very important that
22 although it's not here for informational

1 purposes, it's actually information that can be
2 utilized to help not only secure those funds, but
3 work with those funds to know how to leverage it
4 from the standpoint of a program. So that's why
5 it's in here as opposed to just being for
6 information purposes. So that talks about the
7 local match as well as what's available in Title
8 49.

9 Next? The Coordinating Committee.

10 The Coordinating Committee was established as a
11 result of the negotiated rulemaking. Tribal
12 members that were on the committee felt like once
13 there's a rule out there it is -- for the most
14 part it's written. And a lot of the concerns
15 that the tribal people had was how was the
16 implementation going? Did we catch everything?
17 This was the mechanism -- this group, which are
18 basically appointees by the Secretary of the
19 Interior to appear on this committee and
20 basically as a result of nominations. This
21 primarily describes the nomination process, the
22 roles and responsibilities. In this particular

1 case it referenced in the 2004 regs that we would
2 have a primary and an alternate.

3 This now kind of treats the group as
4 one big group in terms of a working functioning
5 group making those decisions. And so from that
6 standpoint it expanded the committee in terms of
7 their functions and actions, but didn't diminish
8 their roles or their responsibilities that they
9 continue to have as part of this Coordinating
10 Committee.

11 Yes, Jim?

12 MR. GLAZE: I'm sorry to keep coming
13 up, but I think it is important, the part right
14 before that where you were talking about the
15 different sources of funding from states:
16 recreation trails, safety, transit money, which
17 are all items of federal funds that are
18 administered by states that tribes could have
19 access to. We've talked about this before. One
20 of the major policy advances this year, the last
21 couple of years; Andy mentioned it in the MAP-21,
22 that tribes now have a right to get federal aid

1 funds through their existing agreements.

2 And that's a very important advance,
3 because the way it works right now in tribes if
4 you are trying to work directly with a state and
5 get access to state funds, often states will want
6 to put in waivers of sovereign immunity or
7 indemnification provisions or other things that
8 make it very unappealing to enter into those
9 grant funding agreements directly with the state.

10 One advantage of having that ability
11 to move money back from the state to the federal
12 agencies, whether it's BIA or Federal Highways,
13 and then flow through your existing agreements is
14 that the money is actually changed in character.
15 It's recognized as being TTP funds. So that
16 means that all of the benefits that come with
17 that in terms of no waivers sovereign immunity.
18 You're carrying out federal programs, so you're
19 covered by federal court claims coverage. A lot
20 of other benefits come when the money flows
21 through those agreements.

22 So it seems like you're missing

1 another great opportunity right here to kind of
2 enshrine that change in law in these regulations
3 to educate not only the tribes, but also states
4 and other federal agencies if this is allowable.
5 And so by taking it out, it seems like you could
6 actually add another subsection into the reg
7 right after all this discussion of other kinds of
8 money and how tribes can get it to really go
9 through the step-by-step process of how states
10 can agree to transfer the money. And when they
11 do it, the states are also absolved of
12 responsibility.

13 Then the money becomes -- so that's
14 one of the reasons why they want those waiver of
15 sovereign immunity, is because they feel still
16 responsible for the project. But if you can make
17 it go back through the feds and come to the
18 tribes, then it becomes like other TTP money and
19 all the other rules apply. It would be a huge
20 advantage and it really would be a mistake I
21 think for the regs that you're updating not to
22 really highlight that change, because that's a

1 real positive thing that's happened, and it's
2 something that's happened since the last
3 rulemaking. So I would recommend that this
4 section in this -- somewhere here -- this was
5 really dealt with in these new regs. Thank you.

6 MR. GISHI: Yes, Vivian?

7 MS. PHILBIN: Vivian Philbin, Federal
8 Highway Administration. I'd like to answer the
9 second part of the question.

10 Under the super circular which is just
11 out, 2 CFR 200.318 speaks of prudent business
12 decisions and specifically references the lease
13 versus purchase of equipment. While they may not
14 be specifically in 25 CFR Part 900, I do know
15 that 25 CFR Part 900 under the procurement
16 management standards does address prudent
17 procurement business decisions. So I think the
18 analogy is there, which is why we had it in
19 there. Thank you.

20 MR. GISHI: Thank you. Just wanted to
21 kind of touch back on Jim, what Jim was talking
22 about relative to moving those funds. The

1 advantage that we've always had, as I mentioned,
2 I wanted to make sure that we mentioned that
3 early on, was in Title 25 we've always had that
4 flexibility, and for the most part it was
5 prohibiting the Title 23 aspect of funds to be
6 able to be brought across those programs. But
7 we've dealt with -- oh, my goodness, we've even
8 dealt with deep water ports in terms of bringing
9 them under a 638 agreement because Title 25
10 allows to be able to do that.

11 The breakout right now is we have
12 about 50 percent of our agreements, our BIA self-
13 determination, self-governance-type agreements.
14 And we have -- the other 50 percent are under
15 these what we call TTP agreements, BIA G-to-G,
16 sometimes referred to, and the Federal Highway
17 agreements. And so bringing these together has
18 been a real challenge. But Jim's absolutely
19 right, that's the direction we want to be able to
20 head. We believe that that was Congress' intent
21 when a lot of these things were developed. It's
22 just a process of trying to catch up. And so I

1 appreciate your comments on that.

2 Coordinating Committee again. Just in
3 closure, the Coordinating Committee has its own
4 protocols. It has its own committees identified.
5 They have provided a lot of information regarding
6 the implementation of the program. We work with
7 them. They meet -- at least quarterly we try to
8 get meetings with them. Again, of course the big
9 problem is they're under the same budget we are.
10 So when we don't function, they don't function.

11 The TTACs. Formerly it's also
12 referred to as the TTAC. Most of you are
13 familiar with them, the Tribal Transportation
14 Technical Assistance Program Centers. In MAP-21
15 it refers to them as Tribal Technical Assistance
16 Centers. We started off initially with four that
17 were authorized under the ICE-T back in 1991.
18 And since then it has grown to seven that are
19 located nationally. They just went back up with
20 some renewals. But the idea of the technical
21 assistance center of course is to provide --
22 basically provide training, provide technical

1 assistance with regard to transportation. And
2 this basically provides that information and
3 where it can be found.

4 And obviously this is one of the areas
5 where all the references -- I think there was a
6 reference to them being -- how the committee was
7 to be organized and those things, and those are
8 the areas that were removed in terms of that
9 portion that TTACs.

10 Appendix A to Subpart B. This list
11 was corrected for correct statutory references.
12 It eliminated some duplicate entries and added
13 purchasing, leasing and renting of equipment is
14 eligible and goes back to the idea as equipment
15 in terms of construction equipment, whereas
16 previous to this it just referred to the
17 equipment used for the actual implementation of
18 the engineering work. Computers, the GIS
19 equipment, survey equipment and all the other
20 things. Kind of dating how much I've -- how long
21 since I've been in the field. But everything
22 that's kind of fancy out there, I guess is what

1 it would amount to.

2 So that primarily is the Subpart A and
3 Subpart B. Very much a cursory review of those
4 things that we're talking about in terms of
5 policies applications and implementation by not
6 only what the expectations of the Federal
7 Government are, but also the implementation of
8 the program based on what the Tribal
9 Transportation Program is.

10 So at this point, we have Subpart C.
11 If there aren't any questions, I'll turn the time
12 over to Mr. Bob Sparrow.

13 MR. SPARROW: You're doing a good job
14 where you are. Just keep going.

15 MR. GISHI: No, thank you.

16 MR. SPARROW: One thing that you will
17 notice is there used to be an Appendix B to
18 Subpart B. That's one of the appendices that we
19 were told by the IG and others that we needed to
20 take anything similar to that in the appendices
21 out of this NPRM. We fought to keep Appendix A
22 in there as well as a few others. We were not

1 successful in keeping Appendix B in the NPRM.
2 What we have done though is all of the appendices
3 that we have taken or that have been removed from
4 the final rule from 2004 are now located on the
5 Federal Highway and BIA Web sites.

6 If you go to the Tribal Transportation
7 Program Web site, under the NPRM on Federal
8 Highway Administration there's a thing to click
9 on which will take you to all of those appendices
10 that were incorporated really by reference
11 purposes, but we've taken -- they've been removed
12 from the reg and removed from the NPRM, but
13 they're still available because they still
14 pertain to some of the work that is out there
15 that's referenced in there.

16 So you'll see as you start comparing,
17 if you run a compare document between the NPRM
18 that's out there now that you've got in your hand
19 and the final rule back from 2004, you'll see
20 there's three or four different appendices that
21 are in there that are no longer part of the NPRM.
22 Just wanted to make sure you knew where to be

1 able to find that information.

2 Subpart C. This was the part that
3 really talked about the funding formula. Subpart
4 C talks about the Tribal Transportation Program
5 funding. And as it says under MAP-21, and as
6 we've discussed for a number of years, Congress
7 replaced the funding formula that was developed
8 through the negotiated rulemaking process with a
9 statutory formula in MAP-21.

10 So what we've done is we went into
11 Subpart C and in essence we removed all
12 references and the calculation formulas and the
13 tables and the cost tables and the incidental
14 tables that were associated with the old funding
15 formula. Includance of population adjustment
16 factor, the RNDF, the cost tables and others.
17 And what we've tried to do is replace that then
18 with the information or with the law language
19 that's actually in MAP-21.

20 And, Steve, I'm sorry, I know there
21 was an awful lot of work put in those tables
22 because I remember 2003 and '2 when you were

1 working on all those tables, but they really
2 don't pertain to the new funding formula. They
3 were removed. And they'll be kept as reference
4 purposes only at another location.

5 So if you look at 170.200, it
6 describes how the TTP funding amount is
7 determined. It talks about the set-asides that
8 are in place. Again, this is 170.200. It adds
9 new set-asides for the tribal safety. It talks
10 about the administrative expenses. It talks
11 about the Facility Bridge Program. It talks
12 about the transportation planning. So this
13 language that's in there is in essence straight
14 out of the statute. It also talks about the
15 Tribal Supplemental Program and briefly describes
16 it.

17 And then it's further described in a
18 question one or two further down into Subpart C.
19 And it says after deducting the set-asides
20 identified in the paragraph of this section, the
21 secretary will distribute an amount authorized to
22 be appropriated using the funding formula. And

1 the funding formula, what is in 201 -- but the
2 one thing -- let me back up. I apologize.

3 The one thing that I didn't talk about
4 briefly, and I think Andy spoke about it
5 initially, was the transition. Congress gave us
6 a brand new funding formula, statutory, told us
7 exactly how everything had to be calculated, and
8 they said you're going to transition this in over
9 a four-year period. So starting back in 2013 or
10 2012 -- I'm sorry, 2013 and then 2014. And now
11 we're in 2015. We're in the third year of that
12 transition. Next year will be the final year of
13 the transition. And from that point forward if
14 nothing changes in the new Son of MAP-21, or
15 whatever they're going to call it, MAP-21
16 reauthorization -- if nothing changes, then next
17 year the tribal shares will basically stabilize
18 as far as the percentages that the individual
19 tribes will receive.

20 So the regulation talks about in 2014
21 we're going to use 60 percent of the money that's
22 made available for the funding formula. It will

1 be distributed using the formula from 2011 and
2 the tribal shares of 2011. In 2015 it's 40
3 percent. In 2016 it's 20 percent. So you can
4 see over that four-year period they didn't leave
5 the old negotiated rulemaking formula out.
6 They've just transitioned from that to the new
7 formula 20 percent at a time.

8 What's interesting is from 2016 on the
9 old formula counts 20 percent. It never really
10 goes away. So the tribal shares that you
11 received in 2011, 20 percent of that dollar
12 amount is the starting amount of your tribal
13 shares and then the new formula will take over
14 from there in determining the amount of money
15 that each tribe gets. So that is all described
16 in 170.200.

17 170.201, it actually gets into the
18 statutory formula. And again, this language is
19 literally cut and pasted out of MAP-21. It talks
20 about the new factors and how much -- the
21 percentage of each factor in the funding formula.
22 Twenty-seven percent is to the eligible road

1 mileage and it defines what the eligible road
2 mileage is. Thirty-nine percent to the total
3 population of each tribe. And it describes the
4 population of data of where that's to be
5 determined. And then 34 percent is based on what
6 we're calling historic travel shares. So 170.201
7 kind of describes the formula itself and takes
8 care of the new funding factors.

9 202 talks about a set-aside that was
10 previously in 170.200, and it's called the
11 supplemental funding. And it describes how that
12 pot of supplemental funding, first of all, is
13 determined, how much money goes into that pot and
14 then further describes how those funds are
15 distributed out to the tribes. And a lot of it
16 is based on their 2011 shares and trying to
17 offset negative impacts of the new formula as
18 compared to what they received in 2011. So that
19 is really what's defined in 202. Again, cut and
20 paste out of the statute of MAP-21 and put into
21 here. The old references, the old charts,
22 everything else of how that original funding

1 formula from 2004 was developed has all been
2 removed so that you're only looking at the
3 statutory information.

4 170.203 then clarifies how BIA and
5 Federal Highway will allocate the Tribal
6 Transportation Planning Funds. That really
7 hasn't changed at all, the two percent planning
8 that everyone has been receiving.

9 204. What restrictions apply to the
10 TTP funds? In essence, that's saying; and again,
11 references the law, that the funds have to be
12 used on the eligible activities and identified in
13 a TIP. So that really hasn't changed.

14 The time frame for distributing the
15 funds is in 205. It talks about that no later
16 than 30 days after the date of which the funds
17 are made available to the secretary under this
18 paragraph the funds will be made available to the
19 tribes. So that again is statutory language
20 that's in the regulation.

21 The one thing that you will see -- and
22 I'm not sure if it's on here -- it's on the slide

1 -- go back one slide -- is right here. It's a
2 general statement. Again, the High Priority
3 Program has been removed. It's not part of the
4 TTP anymore. It's not funded through the TTP.
5 It's not funded through highway trust funds.
6 It's a stand-alone program, and because of that
7 we've removed all of the references to the High
8 Priority Program from the regulation.

9 So I just wanted to make sure that was
10 -- no, go ahead, LeRoy.

11 Again, 204. We talked about the funds
12 expanded on the projects and the activities.

13 The time frame is on 205.

14 225 talks about the inventory and the
15 long-range transportation plan and how they
16 correlate with each other, that the facilities
17 have to be on a long-range transportation plan
18 and put on the NTTFI. They basically come from
19 that long-range transportation plan. There is an
20 error on the last part of the sentences on
21 170.225 because it's a reference to the High
22 Priority Program that we didn't catch. So it

1 references that the funds can be used to identify
2 projects for the High Priority Programs. So
3 that's something that will be removed in the
4 final rule.

5 226 talks about formula data appeals,
6 and this is the formula data appeals and
7 identifies how and what can be appealed with
8 regards to the funding formula itself. When you
9 look at No. C, 170.226, it's the second B.
10 Unfortunately it's a typo, but it's (c). The
11 appeal processes regarding inventory submissions,
12 it tells you where you can find that. It's in
13 Subpart D at 444(c) regarding design standards
14 and new uses of funds. Those appeal processes
15 were taken out of here, but they're relocated
16 into other parts of the regulation.

17 Flexible financing is discussed in
18 227, talking about can the tribes use flexible
19 financing for projects? Yes, they can. This
20 really hasn't changed from the initial reg in
21 2004. Can they use Tribal Transportation Program
22 funds to leverage other funds to pay back loans?

1 Can you apply to a state -- working with a state
2 from a state infrastructure bank?

3 And then if you do get a loan or you
4 do use flexible financing, how long must a
5 project that's financed remain on a TIP? And
6 we're saying that needs to remain on a TIP as
7 long as you're paying that loan back. It's just
8 identified as a use of the funds. And that's the
9 same thing that we've been operating with since
10 -- probably in the last 10 years. That's really
11 not much of a change at all.

12 That's really Subpart C. It used to
13 be the most complicated -- every little aspect of
14 the funding formula, the cost tables, the
15 incidentals, the condition, everything else that
16 talked about the facilities itself that generated
17 a cost to construct, which was really the driving
18 factor of the old funding formula has been
19 removed. Congress has now told us it's miles and
20 it's very specific miles of what's included
21 either in the 2005 or 2012 inventory. It's
22 population, it's updated every year, and it's

1 historic funds from 2011 back to 2005.

2 Are there any questions on this?

3 (No audible response)

4 MR. SPARROW: We are at a break point.

5 And if we could be back here -- it's 10 minutes
6 to 11:00. What did you say 15 minutes? If we
7 can get back here by five after 11:00, that would
8 be great, and we'll continue on with the next
9 three Subparts, D, E and F before lunch. Thank
10 you.

11 (Whereupon, the above-entitled matter
12 went off the record at 10:50 a.m. and resumed at
13 11:10 a.m.)

14 MODERATOR CAULUM: I'd like to
15 reconvene. If anybody has not introduced
16 themselves yet, perhaps arrived a little late --
17 if you haven't introduced yourself, if you could
18 please do so so we can -- and then we'll move
19 forward.

20 (No audible response)

21 MODERATOR CAULUM: All right. I think
22 everybody's here. All right. I'll introduce

1 Sheldon Kipp and he'll move forward with the next
2 section of the agenda.

3 MR. KIPP: Good morning, everyone. My
4 name is Sheldon Kipp. I'm a supervisory highway
5 engineer in the Division of Transportation,
6 Central Office out of Albuquerque.

7 PARTICIPANT: Speak up. Move closer.

8 MR. KIPP: Again, my name is Sheldon
9 Kipp. Last name is spelled K-I-P-P. Supervisory
10 highway engineer, Bureau of Indian Affairs,
11 Division of Transportation, Central Office,
12 Albuquerque, New Mexico. I'm going to be kind of
13 reviewing the questions and hopefully trying to
14 answer some of the general answers for Subpart D,
15 which is basically planning, design, construction
16 of Tribal Transportation facilities.

17 The first subsection in that Subpart
18 D is going to be transportation planning,
19 questions 400, 401, 402, 403. They are basically
20 updating general information about transportation
21 planning as it relates to the Tribal
22 Transportation Program. And like previously in

1 the earlier presentation identified that 401
2 states, it now includes FHWA. Updates the
3 planning activities for BIA and FHWA to carry
4 out.

5 402 updates tribe lists of planning
6 activities to reflect program changes such as the
7 name.

8 403 identifies what TTP funding can be
9 used for planning activities.

10 Question 404 defines how a tribe can
11 use their unexpended planning funds after all
12 planning activities are completed.

13 405 identifies how the tribes must use
14 their transportation planning funds for those
15 types of activities.

16 410, 411 defines the purpose of a
17 long-range transportation plan and what it should
18 include. There are a few changes in there for
19 that LRTP plan, so that's one of the questions
20 that you probably really should concentrate on in
21 your review process for these consultation
22 sessions.

1 412 identifies how the tribes' LRTP is
2 developed and approved, updated to include FHWA
3 as far as references and some of the oversight.

4 Question No. 413 includes the public
5 role in developing the LRTP, and also again
6 includes the references to the FHWA and the
7 process.

8 I think as far as some of the
9 questions where we're including FHWA it basically
10 pertains to the inclusion of tribes that now have
11 program agreements with Federal Highway. The
12 previous regulation didn't reference or make
13 particular note of that coordination with that
14 agency.

15 414 describes how the LRTP is used and
16 updated.

17 415 adds project identification
18 studies as part of the overall planning process.

19 420 defines the tribal priority list.
20 No significant changes there.

21 One general comment that I want to
22 make about the long-range transportation plan

1 kind of refers back to a question that came up
2 earlier this morning from -- about access roads.
3 There really is not a question that particularly
4 defines or describes the process under which a
5 tribe or a tribal entity will include an access
6 road in their NTTFI. But in the definitions in
7 170.5 there is a definition for "access roads."
8 It does refer to I believe the 23 CFR in the
9 definition process, but in the definitions you
10 will have to take note that there is a length, a
11 maximum length for any access road that is to be
12 included in the NTTFI. So I think that partially
13 answers -- as far as the definition of what an
14 access road and it identifies a maximum length.
15 But that's for definition purposes.

16 The long-range transportation plan
17 here is going to be very important to tribes that
18 have roads that are not within the reservation or
19 not within particular trust land ownership
20 because those are primarily what we would refer
21 to as access roads, roads that provide access to
22 goods and services that are not located on your

1 trust lands. So long-range transportation plans,
2 you identify what public facilities you use on a
3 daily basis as a tribe, as enrolled members of
4 the tribes. That again defines what your NTTFI
5 is.

6 And just kind of remember that the
7 long-range transportation plan, it's not only a
8 document, but it is a process in identifying all
9 types of facilities open to the public that a
10 tribe uses on a daily basis. And for tribes that
11 are smaller in nature, access roads are going to
12 be a part of what you have to deal with and try
13 to get into your LRTP.

14 Question?

15 MR. SPRINGER: Hi, Tom Springer, S-P-
16 R-I-N-G-E-R, Ho-Chunk Nation. In many cases it's
17 not the length of the road, although that's
18 important, but it's really where the access road
19 starts and ends. Length would be where it ends.
20 The other part of that is where it starts. So
21 with regard to an individual trust parcel or a
22 small acreage rancheria like here in California,

1 under the proposed definition where does that
2 access road start? Is it at the boundary of that
3 parcel or is it as has been discussed for -- with
4 the Tribal Transportation Project's Coordinating
5 Committee? Is it a radius around that trust
6 parcel? As approved by the TTPCC it was a five-
7 mile radius around that trust parcel is where an
8 access road would start at that radius. And then
9 everything within that radius would be considered
10 automatically on the inventory, or to be
11 remaining on the inventory.

12 So under this definition can you
13 please elaborate on where that access road would
14 start?

15 MR. KIPP: I think as far as a general
16 inventory response to that it would -- the access
17 road would start from the trust land boundary.
18 And I think as far as identifying a radius, that
19 will have to be determined perhaps in a response,
20 because we have cities that actually are within a
21 5-mile radius, or could be within a 15-mile
22 radius, but there is no direct access to the

1 city. Your road could actually leave your trust
2 land, go six miles, you turn left three miles and
3 there's the city.

4 The definition that we have proposed
5 to use is that once you leave the reservation
6 boundary and you hit that first intersection, a
7 determination has to be made as far as a
8 functional classification. Is it higher or is it
9 lower? Because your access road may stop right
10 there. And a general inventory response would be
11 that perhaps the city that is still within the
12 radius may not be eligible because your access
13 road stops there.

14 But as far as that is concerned, there
15 is also another section I believe that allows us
16 to add roads into the system, but it has to be
17 very uniform and consistent across the whole
18 program. And I think this is going to be a very
19 difficult question to answer right now.

20 But as far as the implementation of
21 that it is our understanding that we hope to use
22 the recommendation from the Coordinating

1 Committee to develop a QA-QC team for road
2 inventory or national tribal transportation
3 facility concerns as far as what facilities can
4 be into the inventory and utilize that quality
5 control-quality assurance team to perhaps define
6 the implementation process for access roads, for
7 proposed roads, for facilities that traditionally
8 have not been in our inventory before such as
9 pier docks, barge docks, boardwalks, those types
10 of things, parking lots. There are a lot of
11 facilities that we identify that are eligible for
12 our program and specifically the NTTFI. We just
13 don't have the actual implementation process
14 down.

15 MR. SPRINGER: Okay. Can I ask a
16 follow-up question, please? So in the executive
17 summary of the proposed rule it also says that
18 not only about adding roads to the inventory, but
19 making a determination on roads that will remain
20 on. Is it the intent of the BIA then to remove
21 roads from the inventory that doesn't meet the
22 definition that you come up with some time in the

1 future that isn't explained in this rule?

2 MODERATOR CAULUM: Andy Caulum with
3 the Solicitor's Office. We don't have the final
4 rule, as you know, in place. This is a proposed
5 rule. So as a result, we're interested in
6 obviously hearing your comments, the tribes'
7 comments and other tribes' comments on proposed
8 rules. So in terms of what happens after the
9 final rule has been issued, obviously we'll have
10 to deal with -- or not deal with -- respond to
11 comments that are made during this process such
12 as your and further comments that are received.

13 So I think the question of what
14 ultimately happens to the roads that are
15 currently on the inventory is going to be
16 something we'll have to answer in the preamble to
17 the final rule. It would be speculative right
18 now I think to give an answer to what our final
19 position on that would be. That obviously is
20 something also that we'd have to make a decision
21 on in consultation with the Assistant Secretary
22 for the Interior as well, because obviously we

1 know it's important to Ho-Chunk and it's
2 important to a number of other tribes as well.
3 But at this point I think it's speculative
4 exactly what would happen once the final rule is
5 issued.

6 Go ahead, LeRoy.

7 Plus, I mean, one other aspect of it
8 is as you may recall the -- when we were doing
9 our consultations on what is Question 10 under
10 the current rule, which in many ways was
11 overruled by MAP-21. That also has affected this
12 issue. And depending on what Congress does, if
13 they do anything before the final rule is issued,
14 that may also affect this question as well if
15 Congress does pass a reauthorization.

16 MR. GISHI: Tom; LeRoy Gishi, BIA
17 Transportation, just so I can get a clarification
18 of not only the audience here, but so that what
19 you're asking is is that roads that are in the
20 inventory, where it refers to some of them may be
21 removed, you know, we've gone through a process
22 prior to this as part of getting to the proposed

1 draft was to go through as part of the exercise
2 of identifying the actual system that's out
3 there.

4 And we did have roads which were
5 duplicates. In other words, they were -- it was
6 identified as Route 20 in the inventory and it
7 may have been Route 40 in the inventory. And
8 once we were doing the GIS verification with our
9 contractor that we'd hired with Federal Highways,
10 we found out that they were the same road. We
11 went through the process of making sure that the
12 tribes were notified and saying this looks like
13 it's a duplicate road. Do you agree? And from
14 that standpoint that process was done.

15 I think from that standpoint it would
16 be nice if in your follow-up you got a response
17 to this to make sure to clarify, because this is
18 very important in how that's being identified.
19 For purposes of the funding formula it's very
20 clear what Congress intended. They did not say,
21 okay, we want you to go out there and take a look
22 at proposed roads and access roads, roads which

1 are a paved surface, roads that are gravel, and
2 those that were in the system prior to 2004,
3 those -- we want to be able -- they basically
4 said all roads that were in the inventory as
5 eligible on October 1, 2004, we want the mileage.

6 And I was just talking to someone
7 earlier. If they were really bad, bad miles of
8 -- 10 bad miles, they're to be considered the
9 same 10 miles just like a road that is 4-lane, 12
10 inches of pavement, shoulders, everything. They
11 have the same value in the formula. So for the
12 formula that's addressed as a statutory issue
13 that came down primarily from that standpoint.

14 From adding and taking from an
15 eligibility standpoint, then I think when you're
16 talking access roads, this is the definition that
17 we're proposing that would go out to the location
18 where the functional class increases to a higher
19 functional class. And then if you could
20 reference that as to what we would be doing, what
21 the Federal Highway and BIA would be doing to
22 remove roads, that would obviously help us to

1 clarify exactly what it is, the concern that's
2 there relative to that other than what we've
3 identified as those which have been looked at
4 finding definitely are identified as duplicative
5 and -- or which we may find out as a result of,
6 as Sheldon indicated, the QA-QC team that's going
7 to be developed starts to begin to look at
8 inventory submissions to be able to see if
9 there's some roads in there which may not be
10 eligible under the program for the purposes of a
11 public road and meeting the definition of tribal
12 lands as what's in the statute.

13 MR. SPRINGER: All right. Thank you.
14 And I agree it is a very important issue for many
15 tribes, and possibly there's a lot of tribes that
16 don't understand the potential impact. I've had
17 conversations with Jacque Hostler from Trinidad
18 Rancheria and discussed their situation and under
19 a strict reading of this definition of access
20 roads the BIA could essentially eliminate the
21 majority of the roads they have on their
22 inventory.

1 And so a follow-up question, too,
2 would be under the current statutory framework
3 under MAP-21 if -- it would be good to get an
4 answer to this -- if the BIA were to remove those
5 roads from the inventory, would it also make a
6 corresponding move to reduce the funding? So if
7 those roads are no longer on the inventory and
8 under the MAP-21, as you mentioned, LeRoy, it's a
9 snapshot in time. So under the law it would seem
10 that that's frozen no matter what happens to the
11 inventory. But we'd like to know. We'd like an
12 answer from the BIA if it's the intent to also
13 have a corresponding reduction in funding.

14 MR. GISHI: At this point, no, there's
15 not. And the reason why is, just as I indicated,
16 the miles are what they are. What Congress
17 approved as the miles under that, basically the
18 run of the MAP-21 formula, whatever it is in
19 terms of what they were identifying, they made it
20 very clear that was the intent. And so from that
21 standpoint we have had -- since we've cleaned up
22 the miles -- we've actually cleaned up miles. If

1 you look at the latest inventory update, Sheldon,
2 the number of BIA miles has decreased from 2013
3 to 2014.

4 But the miles that are identified in
5 the formula for 2012 that basically said this is
6 the sunset on the impact of the BIA miles on the
7 formula is basically what that mileage was at the
8 end of that 2012. And even though they may have
9 been removed because they were duplicates or
10 whatever, we're going off of that mileage. And
11 what it basically said was -- Congress is real
12 bright in this sense in that they said nobody can
13 change a historic number. If it was in the past,
14 then it can't be changed. And so for that reason
15 2004 and 2012 come into play and those are the
16 numbers that we're using.

17 When you look at the appeals process,
18 you'll notice that it refers to the population
19 data because that's a very dynamic number. That
20 changes on a yearly basis. But for the most part
21 those numbers are there and when we've done this
22 presentation we've often joked that if you know

1 what that percentage is from 2011, you may want
2 to have it tattooed on your forearm because that
3 number, as long as MAP-21 is in place is, is
4 going to continue to be there as part of that
5 percentage for what was basically a historic
6 number.

7 But I see what you're saying, and the
8 question you wanted to make was is there going to
9 be some deletion or changes? What does that
10 entail in terms of that statement itself with
11 regard to particularly access roads or those
12 roads that may be in the inventory for purposes
13 of -- now eligibility, there may be an impact.
14 And I guess that's the whole -- I was hoping that
15 you'd head in that direction.

16 From an eligibility standpoint there
17 may be an impact, particularly if it turns out
18 that it's not a TTP facility. And from that
19 standpoint obviously that whole process would
20 involve a government-to-government discussion on
21 what that is in terms of how that's going to go
22 forward. But that's eligible. That's how to use

1 the funds. That's not from the standpoint of how
2 the formula would be considered and viewed.

3 MR. SPRINGER: Okay. Well, thank you.
4 The Ho-Chunk Nation traveled here all the way
5 from Wisconsin to learn more information about
6 how the rule will be implemented, and we'll be
7 present in Minneapolis to probably have -- I
8 would -- the way things are going here, because
9 of the ambiguity in this definition with no other
10 information in the rule about how it will be
11 implemented, I think we will have some more
12 concrete recommendations that should go into this
13 rule and not leave it up to -- with all due
14 respect to the Coordinating Committee, not leave
15 it up to them, but have something more concrete
16 within the regulation. So, thank you.

17 MR. GISHI: Certainly. I thought it
18 was because the last time we went there -- our
19 last consultation for Question 10 was in the
20 Midwest Region, and the evening before Congress
21 decided on MAP-21 and it came out and it changed
22 everything. So we had just a real nice

1 discussion that didn't mean much of anything. So
2 I thought maybe that's why you wanted to be here
3 early so you can catch everything first. Thank
4 you.

5 MR. GLAZE: Sheldon, this is kind of
6 a technical question, but one thing that I think
7 generally would be helpful, it's real hard to
8 track all the changes, particularly what's been
9 left out. And even though you're going through
10 and kind of generally saying what's left out,
11 every word in these regs matters and they have an
12 impact.

13 And one thing that I know that you all
14 did was give out red lines and side-by-sides to
15 the Coordinating Committee back in October or
16 September, but I actually went and looked through
17 those and compared it to the new rule and they're
18 not the same. So it's very confusing when you --
19 if you rely on the red line, there's changes.
20 Small changes sometimes, but maybe some
21 significant ones. I think all of the requests
22 that were done at the last consultation was give

1 tribal leaders red lines and side-by-sides to
2 make it easy to follow what's in and what's out.

3 So maybe you want to speak to that.
4 And then there's one more technical thing I want
5 to ask.

6 MR. GISHI: I want you to note this,
7 Bob. As of 10:45; I don't know what time it
8 is --

9 MR. GLAZE: You'd bet on when this was
10 coming up?

11 MR. GISHI: -- on the first day --

12 (Laughter)

13 MR. GLAZE: Yes.

14 MR. GISHI: No, and so we did do that,
15 and we're just very close. I think we're having
16 the guys look at it real quick. But we're hoping
17 to have that on the Web site. And what it is --
18 and just to make sure everybody know, it is the
19 current rule and the NPRM, and it follows it by
20 number, not by topic. Okay? By number. So that
21 way when someone mentioned that 124 said this and
22 now 124 says that, you'll note that in there.

1 So we're going to put that on the Web
2 site as part of the BIA Web site, because they
3 weren't allowing us to put it up on the
4 consultation Web site. But we'll put it there
5 and it'll be a Word document, or a PDF document
6 that has all of them. And so you might see big
7 spaces in between two questions, or two sections.
8 It's because that whole section is removed and
9 it's trying to keep up with those numbers in
10 terms of that. So we have that coming out real
11 soon.

12 MR. GLAZE: Yes, that's great. And I
13 think it would be useful to actually print them
14 out and have them available at your
15 consultations, if that's possible.

16 But one point like that is a technical
17 thing, on the TTP amendments to the -- it's
18 actually 427, so maybe -- I'm sorry if I jumped
19 the gun a little bit on that. But there is a
20 provision that says that amendments to the
21 previously approved TIP must use the same public
22 involvement process that was used to develop the

1 original TIP.

2 The original wording in that had if
3 the BIA makes amendments, they have to use the
4 public -- but the way it's been changed it
5 suggests that tribes also have to go through the
6 same process. And I recall this was actually a
7 big discussion in the Neg Reg where the BIA had a
8 mandate to do that, so they couldn't get out of
9 it. But there was an agreement understood that
10 tribes were not subjected to that same thing,
11 that if there was a urgent need to make amendment
12 because something to changed and they had to
13 expend the funds correctly and update the TIP
14 accordingly, there may not be time to do a full
15 public process.

16 So that's a concern where the change
17 just one word like that. Where it was BIA, and
18 now it just says -- the current language is an
19 amendment to a previously approved TIP must use
20 the same public involvement or process that was
21 used to develop the original TTP -- or TTP TIP.
22 That suggests that it applies to everyone.

1 And so I don't know if that's what you
2 intended to do, but that's a substantive change
3 away from what the rule, original rule said. And
4 unless you have a statutory mandate to do that, I
5 don't think you should be changing any of the
6 rules that were done by negotiated rulemaking.
7 So, just that's my comment.

8 MR. GISHI: Go ahead.

9 MR. DeLIRA: David DeLira, Dry Creek
10 Rancheria. That's D-E-L-I-R-A. I had a couple
11 of questions. I just want to clarify. Dry Creek
12 is kind of in the same boat as Trinidad. We're
13 small acreage and we -- and our inventory was
14 access roads we relied on a lot. So is that
15 inventory going to be updated automatically by
16 BIA? Does the tribe have any influence or need
17 to do anything?

18 MR. GISHI: Once the regs are
19 basically finalized, I think we intend to
20 basically assess what proposed roads are in a
21 system, what access roads are in a system and see
22 which ones meet the definitions or meet the

1 requirements in what the finalized rule is and
2 basically let the tribe be aware your proposed
3 road lacks justification for this, this and this.
4 This access road is beyond 15 miles as the
5 definition applies. And identify hopefully some
6 sort of assessment tribe-by-tribe and identify
7 this is what now is not in line with what the reg
8 says. It's not going to be totally left up to
9 the tribe. We're going to basically have to go
10 in and assess all the facilities in the inventory
11 and see which ones --

12 MR. DeLIRA: And to be clear, the idea
13 is to not reduce funding, from what LeRoy's
14 saying.

15 MR. GISHI: Yes.

16 MR. DeLIRA: But so we will have some
17 weird number in there.

18 MR. GISHI: Yes.

19 MR. DeLIRA: But the funding will
20 remain more or less the same?

21 MR. GISHI: Well, remember now, when
22 we're talking about access roads and proposed

1 roads, it really depends on what ownership are
2 you talking about, tribal or proposed. In the
3 existing formula if we remove a tribe's proposed
4 roads or a tribe's access roads from the
5 inventory today, we are in the 2015 inventory.
6 We are not going to amend the 2012 inventory. We
7 are not going to amend the 2005 inventory. Those
8 are the raw mileage that Mr. Sparrow talked about
9 as far what is contributing to the formula today.
10 You recall him talking about a 20 percent
11 historical tribal share. Access roads and
12 proposed roads did contribute to that 20 percent,
13 but that is set. Nothing is going to change that
14 besides another act of Congress.

15 So as we talk about amending the NTTFI
16 facilities that exist in there for tribes today,
17 we are talking about the 2015 inventory. The
18 formula is basically using historical mileages
19 from the 2012 inventory and the 2004 inventory as
20 we update the tribal share, as we move to 2014,
21 2015, 2016. So when we talk about a definition
22 for access roads, a definition for proposed

1 roads, the evaluation of what facilities in the
2 inventory meet those criteria and which ones
3 don't meet that criteria, what do we do with
4 them? Like Mr. Caulum said, that's down the
5 road. We have to be able to assess that down the
6 road.

7 But the general idea is to get the
8 regulations set so that we can evaluate what
9 meets the criteria and what doesn't and utilize
10 the Coordinating Committee to make
11 recommendations on are we moving or are we
12 implementing these regulations in line with what
13 the Coordinating Committee may have input on.

14 MR. DeLIRA: A second question I had
15 was we currently have agreements with local
16 agencies, road maintenance agreements where we
17 share costs in road maintenance. How will those
18 agreements be affected if these access roads drop
19 off of the inventory at some point?

20 MR. GISHI: I want to be able to
21 answer that question, but there is another part
22 of that initial question in the part A that

1 identifies that there is a way to add a facility
2 to the inventory, but it has to be uniform and
3 consistent program-wide. And so like I believe
4 what you're asking is if you have road
5 maintenance agreement to maintain a county road
6 as a tribe and the county is going to maintain
7 your tribal road on the other side of the
8 reservation, and you've been doing that for the
9 last 10 years, and now something doesn't meet the
10 definition of an access road and we attempt to
11 take it -- work with you to take it out of the
12 inventory, is it still eligible for TTP funds?
13 That's something that we will most certainly try
14 to take into consideration when the final call is
15 made.

16 MR. DeLIRA: Okay. I mean, we do have
17 one current project that's actually under design.
18 It's a county bridge. It was under the old IRR
19 Bridge Program. So we received funding for
20 design. The design should be complete this
21 season and we'd like to be eligible to do the
22 construction. So that's kind of a concern for

1 us, is are we going to be able to finish that
2 construction or not?

3 MR. GISHI: Okay.

4 MR. SPRINGER: Hi, Tom Springer, Ho-
5 Chunk Nation. Just one last comment real quick.
6 As Mr. Kipp mentioned, the funding is frozen
7 because of the language in MAP-21. However, MAP-
8 21 sunsets or ends on May 31st this year. It
9 will have to be either reauthorized or extended.
10 And it would only take one very simple change to
11 that law to unfreeze the inventory for that, so
12 it could come very quickly.

13 MR. KIPP: That is true. Thank you
14 for your comment, Tom.

15 Okay. I'm going to continue on with
16 Subpart D. I think the Transportation
17 Improvement Programs -- I think you have to the
18 previous --

19 MR. BAILEY: Sorry. Before you go,
20 Sheldon; Adam Bailey, B-A-I-L-E-Y, from Hobbs
21 Straus Dean & Walker, there's one question I had
22 and it was under 170.422. Let me make sure. No,

1 it's 421 talking about the Tribal TIP. There's a
2 new addition that -- a requirement that the
3 Tribal TIP be financially constrained, which is
4 new to this rule. It was not in the draft and it
5 wasn't in the current regs.

6 Tribes we work with are very concerned
7 about that because of the potential impact it
8 will have on artificially limiting the picture of
9 need of infrastructure in Indian Country if your
10 Tribal TIP, which is an internal tribal document,
11 needs to be financially constrained or it's going
12 to restrict tribes' ability to have maybe large
13 projects that exceed the amount of funding that
14 they're getting or the amount of funding that's
15 coming through the TTP Program for them. And
16 we're just very concerned that that's going to
17 lessen tribes' ability to build their own
18 transportation programs and to come up with their
19 own road plans.

20 This is a new feature in this rule and
21 we were just -- first want to raise that concern;
22 and two, want to know what the reasons for

1 including a financial constraint on the Tribal
2 TIP was instead of just the TTP TIP.

3 MR. KIPP: Okay. Thank you for your
4 question. I'm going to try and take the first
5 stab at this question, but I know that overall
6 our program was evaluated by the Office of the
7 Inspector General and the term "financially
8 constrained" came up quite a bit, so hopefully
9 Mr. Sparrow or Mr. Gishi may correct me if I'm
10 wrong. But I believe the financially constrained
11 identification in this particular question
12 pertains to the identification of your use of
13 your tribal share, whatever that maybe, whether
14 it's \$50,000, whether it's \$50 million.

15 The TTIP is identified to -- is
16 basically how you plan to use your funds. It's
17 the document that basically is submitted to the
18 BIA or FHWA and is ultimately approved by Federal
19 Highway. I think it's -- the financially
20 constrained, at least as far as the question --
21 is basically identified to for your short-term,
22 your four-year identification of your tribal

1 share. What are your plans for the use of those
2 funds? Because in the approval process we
3 basically identify that we want to ensure that
4 the projects that are on the TTIP are eligible
5 activities. And that's primarily the quality
6 assurance process that we go through.

7 When a tribe that has a BIA agreement
8 or a Title 1 agreement, or a Title 4 compact --
9 when they submit their TIP to us, that's one of
10 the very first things we look at, is what's your
11 tribal share and is the TIP very, very close to
12 that dollar amount? And I think that's as best
13 an answer as I can give. It's intended to
14 identify your use of your tribal share.

15 And as far as going through this
16 Transportation Improvement Programs for 421, 22,
17 23 and 24, the questions are generally the same,
18 but like somebody did identify is that one word
19 here and there can change it quite a bit.

20 One of the things I do want to just
21 make a note of, between 421 and 422 the TTIP is
22 basically a tribal document. When you do your

1 long-range transportation planning, you develop
2 your tribal priority list, you develop your
3 Tribal TIP.

4 422, the Tribal Transportation Program
5 TIP. In general what that is for is when a tribe
6 just gives the BIA a tribal priority list and we
7 would develop a TIP on their behalf. And it's a
8 little bit difficult to kind of get that concept
9 out of the questions here, but I believe that's
10 what it's intended to be because it can get quite
11 confusing when somebody says TTIP, TTP TIP. So
12 when you read those two or three questions, just
13 kind of make sure that you kind of have that in
14 the back of our mind when you're reading through
15 those questions.

16 Next? 425, 426 provides information
17 out of the TTIP annual update is carried out.
18 Again, there was a question here as far as
19 additional wording identifying procedures on how
20 to update a TTIP versus a TTP TIP.

21 27 describes how a tribe can amend its
22 approved TIP. That was the question that

1 basically came up.

2 428 describes how a state will receive
3 the TTIPs. No significant change there. And
4 basically that is kind of identification that
5 ultimately the Tribal TIPS and the TIPS that we
6 approve, BIA and FHWA, on behalf of tribes, they
7 are included in each state Transportation
8 Improvement Program. So for any particular tribe
9 that has a TIP, eventually that gets rolled into
10 the state Transportation Improvement Program.
11 And then that's kind of the purpose of Question
12 428.

13 Next? TTP facility inventory. 422
14 describes the NTTFI and what is included.
15 Basically the question and the answer basically
16 reflects the statutory language. Again, remember
17 that this particular question is identified, what
18 is eligible as far as a facility that can be
19 included in the inventory. And as we go through
20 a lot of the highway authorizations what type of
21 facility can be added to the inventory? It
22 changes quite a bit. It's not just roads and

1 bridges. Hasn't been roads and bridges for a
2 long time. We have a lot of other eligible
3 facilities that are eligible for the NTTFI.

4 433 defines the proposed facility and
5 includes the process and requirements to
6 successfully include it into the NTTFI. A lot of
7 review and work and education of the Coordinating
8 Committee was done on this particular one.

9 Basically the Coordinating Committee did bring up
10 the issue of proposed and access roads, and this
11 is kind of a result of their efforts. Basically
12 this is something that is fairly new as far as
13 identifying what documents need to be submitted
14 with facilities that are identified as proposed.

15 444 describes how the entity FI is
16 updated. Somebody had previously mentioned
17 before this has been expanded to add a facility
18 to the inventory, update a facility that is
19 already in the inventory. And I believe there is
20 also a third portion now that basically
21 identifies how to appeal a basic -- if you apply
22 to add a facility to inventory and we respond

1 back saying we don't believe it to be the
2 eligible, there's an appeal portion that's
3 actually in there. So that has been expanded to
4 handle those types of information.

5 445, 446 describe the strip map and
6 minimum attachments required for the facilities,
7 both as when you're adding brand new and existing
8 facilities in the inventory.

9 Next slide? Environmental and
10 archeological requirements. 450, 451, 452
11 identifies the TTP environmental and
12 archeological requirements are located on the BIA
13 and FHWA Web sites. Indicates that TTP funds can
14 be used for compliance work pertaining to those
15 types of activities: archeological and
16 environmental reviews, biological assessments,
17 those sorts of activities that are related to
18 actually getting the compliance documents for
19 those two portions, environmental and
20 archeological.

21 Design. 454 identifies the requirement
22 of a design standard and where they can be found.

1 Also describes how the use of a new design
2 standard can be proposed and utilized by you as a
3 tribe.

4 455 clarifies what other factors
5 influence projects designs.

6 456, 457 states how tribes can request
7 design exceptions and the appeal process if the
8 request is denied.

9 Review and approval plan specification
10 and estimates. 460, 461 identifies the
11 composition of a project package and the
12 procedures for a tribe to approve their PS&E.

13 463 identifies the actions to be taken
14 if the secretary identifies a design deficiency.
15 For that one I believe there is also reference to
16 an appeal process in there, I believe.

17 Construction and construction
18 monitoring. Identifies the construction
19 standards that must be used and how projects are
20 to be administered.

21 472 clarifies what construction
22 records must be kept and accessible for review on

1 construction projects.

2 473 provides information on when a
3 project is considered complete and how and by who
4 a project close-out is conducted.

5 Management systems. In general
6 program reviews were removed from this section as
7 this work is now included in the national
8 business plan. The question at 502 identifies
9 the requirements for national management systems
10 and also as well as what funds a tribe could use
11 if it desired to have its own management systems.

12 Bridge Program. 510 to 514 identifies
13 the Tribal Transportation Program Bridge Program
14 as a source of funding for bridge work, where
15 additional regulations can be found, how funds
16 are made available to tribes, and also updates
17 the bridge inspection requirements that have been
18 set in place by MAP-21.

19 I think these series of questions
20 basically identify a reference to the 23 USC
21 where the Tribal -- help me out with the name of
22 that program over there.

1 PARTICIPANT: The Tribal
2 Transportation Facility Bridge Program.

3 MR. KIPP: There we go. Basically the
4 Bridge Program. The source of funding for
5 replacement and rehabilitation of bridges is not
6 within that 23 cite, but it within the 23 cite.
7 So it just references that.

8 Yes, a question?

9 MS. TRIPP: Hi, Sheldon. Sandy Tripp,
10 Karuk Tribe, T-R-I-P-P. Karuk, K-A-R-U-K. Going
11 back to 170.446(g), acknowledgement of public
12 authority responsibility, this is part of the
13 minimum attachments for the inventory. Sorry I
14 waited awhile here. You went through it fast.
15 At one of the Coordinating Committee meetings we
16 discussed this and we recognized the fact that
17 tribes have run across a lot of difficulties with
18 agencies such as counties and cities to acquire
19 this kind of documentation. And due to that
20 fact, at the Coordinating Committee meeting we
21 felt that it not be necessary to have that
22 document as one of the minimum attachments for

1 getting a route or facility on the inventory.
2 I'm very concerned about this, for us and for
3 other tribes across the nation, that we are
4 really held hostage by these counties and cities
5 to even be able to get routes onto the inventory,
6 routes that go through our reservations or trust
7 lands.

8 And so with that being said, I'd like
9 to say that these roads are public roads anyway.
10 They are identified in the 5704s by who the owner
11 is and if we were to go into an agreement with a
12 county or a city, we'd have to have a document,
13 an agreement document anyway. So I don't think
14 that this should have to be a requirement. And
15 that's my comment on this particular minimum
16 attachment.

17 MR. KIPP: Thank you very much.

18 MS. TRIPP: Thank you.

19 MR. KIPP: I just want to maybe just
20 make a little comment on that. And she is right,
21 we have a number of tribes that basically are
22 unable to get that letter of acknowledgement or

1 that MOA from another entity, whether it be a
2 county, a township, a borough. In some cases we
3 even had a state that basically did not want to
4 provide that document to the tribe.

5 I know that as far as in working with
6 some tribes who are in that situation we
7 basically tried to even get those public entities
8 to say give us your maintenance responsibility.
9 Give us a map of what roads you maintain as a
10 public agency. Rather than trying to just get a
11 document signed by some sort of administrator of
12 that particular agency identifying this is where
13 we sit and this is where we are, we basically
14 said, well, you have maps on the Internet that
15 show the county system, that show the township
16 system. We basically had to use some sort of
17 documentation like that to get around it.

18 But that is a very good comment. And
19 like I said, even today we still have more than a
20 few tribes that that is a still hurdle as far as
21 getting those documents from those entities. But
22 we do try to work our best with those entities to

1 get some sort of alternate document other than
2 the county commissioner's signature or some sort
3 of public map that shows this is the system that
4 we maintain on a daily basis. But very good
5 comment.

6 MR. QUINN: Yes, Herb Quinn, Pit River
7 Tribe, Q-U-I-N-N. I wanted to go back to the
8 443. And I was looking at that and it says is a
9 clear written statement of willingness to provide
10 a right of way from each land owner. Is that the
11 51 percent for trust land if you put a road on
12 the inventory? Does that apply to that? Is that
13 the rule for that?

14 MR. KIPP: I would say yes. I believe
15 what you're asking for is if we propose a road,
16 tribal or whatever, across allotted Indian land.
17 What you're talking about there is when you say
18 51 percent, you're talking about --

19 MR. QUINN: Yes.

20 MR. KIPP: -- allotted trust land, not
21 tribal trust land.

22 MR. QUINN: Right.

1 MR. KIPP: I would say the answer to
2 your question would be yes. We would need at
3 least 51 percent of the owners to be able to say
4 yes. At the time of construction or at the time
5 of design we promise to be at the table and
6 provide right of way for those types of
7 facilities.

8 MR. QUINN: Okay, yes. And I know
9 with all the -- in the BIA people retiring and
10 stuff, so it's real hard to get help to get
11 letters to heirs to find out who even -- who all
12 the heirs are to those lands. So it's really
13 tough to even that information from BIA.

14 MR. KIPP: Yes.

15 MR. QUINN: So, just a comment.

16 MR. KIPP: Yes, and as we move through
17 the implementation of the final regulations, when
18 we identify proposed rules and this is the
19 checklist of what we must have, that's going to
20 be one of the instances that's going to have to
21 be kind of one of the instances under how do we
22 handle it, how do we propose to move forward?

1 Because there is a difference in getting some
2 sort of direction on what we're going to do or
3 what we're going to propose on tribal trust land
4 versus allotted trust land.

5 MR. GLAZE: Just to follow up on the
6 gentleman's point, somewhere in here is there
7 going to be a recognition that the right of way
8 regulations are also being updated and that that
9 -- I mean, a big concern that the Tribal
10 Transportation Program Coordinating Committee
11 identified is that there's not enough
12 clarification about the fact that when tribes are
13 building roads over their own lands there really
14 is not right of way required because you're not
15 transferring ownership. You're just dedicating
16 that area for a public road. And it gets to be
17 very confusing when the tribes are trying to
18 access right of way documents. It's a very slow
19 process, a very costly process. And again, every
20 chance you have to help streamline and make this
21 program more efficient should be used.

22 And it seems like one thing that is

1 not really coordinated in here is the changes
2 that are being made to the Part 169 regulations
3 to try to clarify when you need to use right of
4 way and when you don't should also be reflected
5 in here, it seems like. That's not necessarily
6 the proposed road issue. I'm talking about just
7 in terms of developing a project, if you need to
8 go out and get right or way. If it's tribal
9 trust land, there's no real reason to acquire
10 right of way through the BIA process. You really
11 want to try to get it dedicated by the tribe for
12 a public use.

13 So is that something you guys have
14 considered, or would you be open to considering
15 that?

16 PARTICIPANT: That's a good question.
17 That's a very good statement. That's a very good
18 question.

19 MODERATOR CAULUM: Yes, we would be
20 open to considering that. One thing to keep in
21 mind; and I'm not going to get into too much
22 detail on it, you remember there's a specific

1 comment in the preamble to the current regulation
2 talking about the right of way issue. I was not
3 around for that discussion, but the preamble
4 obviously references it and it's a very good
5 historical note and something that I've gone
6 over.

7 I have been involved from time to time
8 in the process of the rewrite of 25 CFR 169,
9 which is the right of way regulations. I think
10 the comment period got extended again, right --

11 PARTICIPANT: Yes.

12 MODERATOR CAULUM: -- or is closing
13 fairly soon?

14 PARTICIPANT: Right.

15 MODERATOR CAULUM: We definitely are
16 aware of that process and what's going on. One
17 of the things that we run into though is
18 limitation with OMB with referencing other rules
19 specifically here because they get nervous that,
20 you know, what if that rule gets changed or
21 things of that nature. But we will definitely be
22 addressing that as we move forward. And we

1 encourage any comments that anyone has on that as
2 well.

3 MR. GLAZE: We'll write it up, but I
4 do think it's not the same thing to say -- in
5 this reg to advise tribes that you don't have to
6 go through a process of another reg if you don't
7 need to. So I mean, that seems to be within the
8 scope of your reg and still can be coordinated
9 with the other realty people. But I think to the
10 extent you're worried about cross-referencing the
11 other regs, you could just simply say when it
12 does not apply and how you do it.

13 MODERATOR CAULUM: Yes.

14 MR. GLAZE: So that's something you
15 would have scope to do. Okay.

16 MODERATOR CAULUM: All right. And
17 just very briefly, the issue that Mr. Glaze is
18 referencing we have addressed informally on a
19 tribe-by-tribe basis. It's also been known with
20 the Coordinating Committee that in effect if a
21 tribe wishes to build a road across trust lands
22 where there's no other rights that are

1 implicated, there's no allotments, there's no
2 other easements say for a power line and things
3 of that nature, where basically it's what you
4 would view as largely just vacant land, they want
5 to build a road across that, they do not need a
6 right of way or an appraisal from the BIA realty
7 office for that. Because who would be the
8 grantor and the grantee? The tribe would be
9 effectively paying the tribe, and that just
10 doesn't make any sense.

11 So informally that's our view, but we
12 definitely will take those comments and any other
13 comments we have on that issue into
14 consideration.

15 MR. KIPP: Okay. The last portion of
16 my presentation is going to be the appendices for
17 (a) and (b) to Subpart D have basically been
18 removed and they basically are going to reside on
19 the BIA and FHWA Web sites. So, that's pretty
20 much it for Subpart D.

21 MR. SPARROW: Any questions?

22 (No audible response)

1 MR. SPARROW: All right. We
2 originally thought we would get through Subpart E
3 and F before lunch, but we're already 15 minutes
4 late. So how about; it's five after 12:00, that
5 we reconvene at 20 after 1:00, which is still the
6 hour and 15 minutes for lunch. And we'll do the
7 remaining sections, which really I think we had
8 more than enough time originally this afternoon.
9 We'll cover the remaining sections when we get
10 back at 1:20. Okay.

11 MODERATOR CAULUM: Okay.

12 MR. SPARROW: Thank you.

13 (Whereupon, the above-entitled matter
14 went off the record at 12:05 p.m. to reconvene at
15 1:20 p.m.)
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1 is something that I think has been the process
2 for quite some time and we just wanted to ensure
3 that that's the understanding of everybody.

4 Miscellaneous describes what force
5 accounts methods may be used in the TTP. Mr.
6 Glaze is not here. I know that's one of his
7 particular interests is tribes being able to
8 employ their own -- use their own roads
9 department people to do the work. And that is
10 obviously a huge advantage, especially for tribes
11 that have enough wherewithal to be able to stand
12 up their own roads departments rather than having
13 to contract the work out.

14 170.606 identifies legislation and
15 procurement requirements of the TTP. There
16 weren't any significant changes there.

17 And 170.607 and 609 describes use of
18 funds for contract support costs and start-up
19 activities. From time to time we run into
20 questions or, not disputes, but misunderstandings
21 about what -- using funds for start-up
22 activities. That's something that was an issue

1 that arose in a couple situations in the Road
2 Maintenance Program. I don't know that it's been
3 something we've had recently in the Tribal
4 Transportation Program, but as some tribes are
5 looking to establish the program for themselves,
6 in some cases we've had to address that.

7 Subpart E continuing. Contracts and
8 agreements. 170.610 identifies the functions
9 that tribes may assume in their agreements with
10 BIA and Federal Highway.

11 170.611 identifies the special
12 provisions that apply to self-determination and
13 self-governance contracts. No significant
14 changes there.

15 612 describes that non-contractible
16 activities are funded out of the funds identified
17 in 202(a)(6), which is the program management and
18 oversight funds. And they can be used only by
19 BIA Federal Highway. Identifies that these can
20 be found in the appendix to the subpart.

21 614 is updated to reflect that tribes
22 may receive partial funding as that funding

1 becomes available to Federal Highway and BIA.
2 And unfortunately we're all too well aware of
3 this. As you know, the current authorization
4 only goes until the end of May, which is -- you
5 told me this last night, Bob -- it's 200 and --

6 MR. SPARROW: Forty-three days.

7 MODERATOR CAULUM: Two hundred and
8 forth-three/three hundred and sixty-fifths is the
9 funding that is now being made available to
10 tribes. And then once we get to the end of May,
11 we'll hopefully have the remainder of the funds
12 available.

13 615 to 618 updates availability of
14 advance payments, receiving additional funds if
15 they become available, the Tribal Transportation
16 Program on a nationwide basis, contingencies and
17 savings to align within the statutes.

18 Subpart E, continued. 619 identifies
19 when tribal preference and Indian preference
20 apply to TTP. No changes other than adding
21 references to program agreements.

22 620 clarifies that reimbursable and

1 other agreements with state or local governments
2 for a TTP project may include self-determination
3 acts, Indian preference provisions. And that
4 would go along with what we were talking this
5 morning about if tribes and states are able to
6 work out agreements where the funds can be
7 transferred back up through BIA of Federal
8 Highway and then back out to the tribe under your
9 program agreement or under your Federal Highway
10 agreement, this would be something that you could
11 apply there.

12 621, no significant changes other than
13 adding the Federal Highway and BIA TTP agreements
14 as a reference.

15 Subpart F, program oversight and
16 accountability. Actually I wanted to stop now
17 that we're finished with E. Does anybody have
18 any questions on E?

19 (No audible response)

20 MODERATOR CAULUM: And just as a
21 general comment on E, and in many places in the
22 regulation we added the phrase "other appropriate

1 agreements." We're adding reference to BIA
2 agreements, Federal Highway agreements. You
3 probably have seen that. That is really the most
4 significant factor in the way the program has
5 changed since the regulation was published in
6 2004.

7 Then going on to Subpart F, program
8 oversight and accountability. 170.700 describes
9 what the TTP Stewardship plan and national
10 business plan is, the infamous national business
11 plan, which hopefully we have done soon.

12 170.701 clarifies that a tribal or BIA
13 MOU may be used to identify work the BIA will
14 carry out at the tribe's request.

15 170.701 identifies that the
16 secretaries review and monitor the performance of
17 all TTP activities.

18 And 703, 704 describes what program
19 reviews the secretaries can conduct and how
20 improvements are identified or acted upon.

21 So those are I would say generally
22 more in sort of a housekeeping vein. I don't

1 think there's anything particularly controversial
2 in either one of those sections.

3 Anybody have any questions or comments
4 at this point?

5 (No audible response)

6 MODERATOR CAULUM: Okay.

7 MR. GISHI: We made mention earlier
8 that when we started getting into the afternoon
9 that the sections would start to get longer. The
10 subpart that Andy just finished, Subpart F, was I
11 think five questions or so in the current reg,
12 and it was down to four, or whatever it is, but
13 the point being that in most of these cases,
14 because it's fairly well defined either in
15 statute or referring to the authorities that are
16 associated with the agreements themselves,
17 whether they're 638 or the programmatic
18 agreements or the TTP agreements, a lot of the
19 authorities that are associated with those are
20 stated in those agreements themselves.

21 Again, going back to the idea that
22 we're, as partners with tribal governments,

1 trying to minimize the amount of wording in these
2 things, but concentrating more on the authorities
3 that are already in place with regard to those
4 procedures.

5 Yes, Jim?

6 MR. GLAZE: I'm sorry to keep coming
7 up. I did want to just raise one issue. People
8 are going to start throwing things at me because
9 they want me to sit down.

10 (Laughter)

11 MR. GLAZE: But one concern -- we're
12 actually just trying to understand it because
13 we're worried about the language, and this is
14 actually -- I'm sorry to go back to Subpart E,
15 but the sections on 170.600 and 170.612, we read
16 those as potentially saying that the only access
17 to PM&O and PRAE funding, the six percent money,
18 is with Federal Highways and BIA. But that's not
19 the case with tribes that go to Federal Highways
20 because it does say specifically in there that if
21 tribes assume programs and take on secretary
22 responsibilities with Federal Highways they're

1 entitled to a portion of the PM&O and PRAE money.

2 So I wanted to know -- I would assume
3 that our read of it is saying it's only BIA and
4 Federal Highways is unintentional, because that
5 would be contrary to federal law. So is that
6 something you guys have talked about internally,
7 or what was intended there?

8 MR. GISHI: We have to follow the law.

9 MR. GLAZE: Right. So but I --

10 MR. GISHI: So we'll clarify that.

11 MR. GLAZE: That's --

12 MR. GISHI: We probably need to put
13 something there. It's actually in the statute
14 itself.

15 MR. GLAZE: So tribes have a right to
16 access some of those funds when they assume --

17 MR. GISHI: Absolutely.

18 MR. GLAZE: Yes. Okay.

19 MR. GISHI: Thank you.

20 MR. GLAZE: Sure.

21 MR. GISHI: Okay. Subpart G,
22 maintenance. As I mentioned earlier, maintenance

1 is one of those elements that was identified in
2 the previous -- the current rule as including
3 road maintenance. And the whole idea -- and it
4 was a very, very good idea. Jim brought it up.
5 But a lot of this information that was in there
6 in the current regulations was put in there for
7 the purpose of making sure that information --
8 one-stop shopping, the whole idea of not having
9 to go look for things.

10 There's a lot of good references in
11 there so that if someone wanted to know about,
12 for instance, hazardous waste, the reg wasn't
13 going to tell you everything you needed to do,
14 but it could point you in a direction that you
15 wanted to go so you could start looking at
16 specific regulations and would allow you to be
17 able to do that. And that of course was as a
18 result of the procedures. The process of
19 including these in there haven't changed.

20 So we get to -- and maintenance was one of
21 those. And what we tried to put in there is --
22 of course maintenance is an eligible activity

1 under TTP, as we mentioned. Some of the same
2 activities that are related to the DOI Program
3 under TPA are very similar to that in here. And
4 so a lot of this information is repetitive of
5 what was in the regs before. Obviously
6 referencing the little diagram we had on how the
7 maintenance program is related to the TTP Program
8 are no longer there. That's primarily directed
9 to specifically address road maintenance under
10 the provision of Title 23.

11 So as we get to that, as you look in
12 there, it removes the BIA Road Maintenance
13 Program and focuses strictly on the maintenance
14 activities and functions allowed under TTP. The
15 big thing is is when we start getting toward the
16 end we reference an appendix that actually talks
17 a little bit about what's eligible from that
18 perspective.

19 The funding that's available for the
20 maintenance, of course that is statutory
21 language. Clarifies the funds designated for
22 maintenance cannot be used for improvements in

1 terms of -- and primarily what it's looking at
2 there is not necessarily challenging the source
3 of the funds, but the concept of making -- doing
4 road maintenance activities. And I know that
5 sometimes that might be a little confusing in
6 terms of how that's written, but if you look at
7 the reg itself, that's what it's basically
8 looking at.

9 208, tribes can carry out maintenance
10 activities. We've seen a lot of tribes over the
11 past couple of years under the MAP-21 start to
12 increase the amount of activities that they're
13 designating or their funds, that they're
14 designating for road maintenance, which has been
15 a decision that they've been able to make. The
16 flexibility of funding obviously has been met
17 with I believe some sense of relief in terms of
18 those things that you run up against on an annual
19 basis. This does not throughout this process --
20 it does not in any way indicate or substitute
21 that there is -- that these funds make up for any
22 other funds that might be available under not

1 only -- as most of you are aware FEMA funding
2 that might be available out there, the ERFO
3 funding, which is emergency relief for federally-
4 owned projects, which is again administered
5 through FHWA at that level, primarily again just
6 road maintenance here.

7 803 identifies what standards the
8 Tribal Transportation facilities must be
9 maintained subject to funding availability.

10 804 describes actions that can be
11 taken if maintenance funding is deemed
12 inadequate. This is a big part of what the
13 Rulemaking Committee put in there. It was
14 basically the process to make sure that -- some
15 have brought this up, that if roads are not be
16 maintained, particularly if they are roads which
17 are on the TTP inventory; in other words the
18 National Tribal Transportation Facility
19 Inventory, and the tribe feels that they're being
20 neglected from the standpoint of whoever the
21 ownership is, either if you can't get an
22 agreement with them or it has an impact on the

1 traveling public that is on or near Indian lands.

2 805 identifies that the BIA and FHWA
3 Web sites are where tribes can find a list of
4 eligible maintenance activities. And of course
5 that's part of that process, that list that was
6 over in the previous where the current regs will
7 be placed.

8 Again, road maintenance. Some may
9 ask, well, where does BIA enter into all of this?
10 That is something that once we realized that this
11 is no longer going to be included in these
12 regulations, it's very clear that we have to
13 follow up with that and develop guidance, and
14 even to the extent the regulations probably on a
15 road maintenance standpoint. So we're looking at
16 that very closely. We'll be working -- as a
17 matter of fact we talked with the Coordinating
18 Committee in November, the latter part of
19 November, and that was one of the issues that
20 came up, that we will be working with them on and
21 identifying a mechanism to get road maintenance
22 activities out there under the TTP Program.

1 Subpart H. Subpart H was previously
2 a section that had a lot of the -- in addition to
3 some reporting requirements the Tribal
4 Transportation Departments had also had the ERFO
5 Program. It had the removal of hazardous waste,
6 as we mentioned. Those have been taken out.
7 It's fairly streamlined now. And of course the
8 emergency relief, the hazardous waste are no
9 longer there as a general message of the changes
10 to Subpart H.

11 Reporting requirements and Indian
12 preference. Section 910 describes how BIA and
13 FHWA must provide information to tribes after
14 receiving a written request. And primarily --
15 let me make sure that I have that available here.
16 What information on the TTP or projects must BIA
17 and Federal Highways provide. And of course
18 what's available out there within a reasonable
19 time length. And again, this is part of the
20 overall coordination of not only the projects,
21 the TIPS and that coordination of tribal
22 projects, particularly in those areas where we

1 have direct service-type functions.

2 Section 911 through 917, provide
3 information on Indian preference in employment.

4 Basically no changes that were made in this
5 section. And if you look back on what's in
6 statute and in Title 23 and a lot of the other
7 areas, these sections right here pretty much
8 reflect those that are in statute and in
9 regulation as it is now.

10 Section 910 describes the secretaries'
11 collection of data on the -- 918, excuse me,
12 under the TTP Program primarily for the purpose
13 of implementing the program under a self-
14 determination, and what are those kind of things
15 that we're looking at? What kind of data
16 collection? And of course the big things are
17 inventory data, which is a necessary part of the
18 long-range planning process and the Bridge
19 Program, which is a requirement under Section
20 144, which was covered in the bridge process
21 earlier in I think E -- D that Sheldon covered.

22 Yes, Jim?

1 MR. GLAZE: LeRoy, just for process,
2 because taking out emergency relief in all of
3 these provisions, taking out the maintenance
4 program, unless they're going to be dealt with in
5 other regulations that the tribes have input
6 into, I mean, again you're taking away a lot of
7 work that was done through negotiation and
8 research and that the law hasn't changed on. In
9 fact, the law has gotten better on emergency
10 relief for tribes with FEMA designations and
11 things.

12 So what I'm trying to follow is is
13 this just being done because somebody at OMB said
14 you should do this, or is your -- in other words,
15 can't Interior push back really hard on this
16 stuff and say we can't take things out of a rule
17 that was negotiated through a negotiated
18 rulemaking act unless the law has changed? If
19 the tribes and the federal people that made the
20 rule thought this was important -- and in fact
21 tribes need to know how to do emergency relief
22 and they need the regs to kind of help clarify

1 that happens. It seems to me that you guys have
2 got to fight this battle if it's just being -- I
3 mean, where is the rationale to take this stuff
4 out of the reg? And where is it coming from, I
5 guess is my question.

6 MR. GISHI: I believe, Andy, coming
7 from OMB.

8 MODERATOR CAULUM: Yes. Part of the
9 -- I think what Jim raises -- Any Caulum,
10 Solicitor's Office. Jim raises an issue that we
11 have -- not an issue, but the Road Maintenance
12 Program, as you know, the funding from that comes
13 out of DOI, right?

14 MR. GLAZE: Yes.

15 MODERATOR CAULUM: And again, I was
16 not here when the negotiated rule was done.
17 However, what has happened from time to time is
18 that there's been a -- what we call a -- there's
19 been sort of a -- tribes have -- sometimes they
20 misinterpreted that the TTP rule, or the current
21 regulation, is the controls for the Road
22 Maintenance Program. And that's not the case at

1 all, right?

2 And you raise a very important point,
3 that if they are coming out, then should we do
4 road maintenance regulations? And that --
5 meaning for the BIA Road Maintenance Program
6 itself.

7 MR. GLAZE: But what you lose when you
8 use the principle that the -- the core principle
9 of the Neg Reg was these regulations should be
10 developed for the benefit of tribes. I mean,
11 obviously there's federal responsibilities.
12 Federal statutes have to be complied with. But
13 the thought behind everything that was put into
14 it was how do we help tribes be successful
15 running these programs? And the more information
16 they had that was locked and not referencing to
17 things that can change any day.

18 MODERATOR CAULUM: Yes.

19 MR. GLAZE: I mean, by having it
20 locked in there was some tangible quality to,
21 hey, I know what I'm supposed to do. And that
22 was true for -- that's why road maintenance was

1 in there. It was because there were no regs on
2 it --

3 MODERATOR CAULUM: Sure.

4 MR. GLAZE: -- and they wanted to lock
5 it in and be -- understand how it worked. So
6 when the federal -- if you guys are going to
7 unilaterally remove these things, it seems like
8 as the trustee for the tribe -- the Interior
9 agency -- we also hear these are the Secretary's
10 rules. They're not OMB's rules. They're not the
11 Federal Register's rules. So it seems like if
12 you guys don't agree with these changes --
13 because they do contradict what was agreed to in
14 the negotiated rulemaking, and they take away
15 information that's valuable for tribes to know
16 how to do this stuff. It seems like you guys
17 have to push back on that.

18 I realize this is now at the NPRM
19 stage and there's got to be comments from tribes,
20 but it also seems like you all can continue to
21 try to, as a policy matter, say I know we did it
22 in the NPRM, but we shouldn't do it. We should

1 go back and put this stuff back in.

2 And I do hope, tribal leaders, if you
3 agree with what I'm saying, you get these
4 comments in there because they're taking away a
5 lot of things. And I don't think it was these
6 folks doing it, but I think you got overruled or
7 whatever. But it needs to be fought for because
8 they're important. And in fact you could update
9 them with emergency relief to talk about FEMA
10 designations and things that tribes don't about
11 that there's no regs on. So I would think you
12 want to only make changes that make things better
13 and help the program be managed by tribes more
14 easily. Okay. I'll stop talking about that
15 issue.

16 MODERATOR CAULUM: One of the
17 challenges for us is that OMB works for the
18 President, just like we do, right?

19 MR. GLAZE: Right.

20 MODERATOR CAULUM: It is the
21 Secretary's rules, but as you know the Secretary
22 is appointed by and reports to the President.

1 OMB is basically within the Executive Office.

2 MR. GLAZE: Having been at some White
3 House conferences on tribal nations --

4 MODERATOR CAULUM: You're well aware
5 of this, right?

6 MR. GLAZE: -- I think if President
7 Obama was sitting in this room, he'd say
8 absolutely, do what he's saying, because --

9 MODERATOR CAULUM: Yes.

10 MR. GLAZE: -- this is not -- he
11 doesn't want to make it harder and more
12 bureaucratic --

13 MODERATOR CAULUM: We agree.

14 MR. GLAZE: -- and take things away.
15 He always tells tribal leaders he wants to
16 empower them to run their own --

17 (Simultaneous speaking)

18 MODERATOR CAULUM: Absolutely. And
19 that point is very well taken and I do hope we
20 get -- I'm -- well, I have no doubt we will get
21 written comments on this, at least from you, if
22 not from many other tribes as well.

1 But one of the challenges is that the
2 funding for -- as I mentioned, the funding for
3 road maintenance comes up out of a different
4 appropriation and for the BIA Road Maintenance
5 Program that's more specified for the BIA Road
6 Maintenance Program. And as many of you know,
7 there's a very -- BIA faces enormous challenges
8 with respect to the backlog of road maintenance
9 that's required on their roads. That's just
10 simply not being funded right now.

11 But that is something we definitely
12 will be looking at as we go forward. But
13 generally speaking the purpose of it was it's a
14 separate program. And there has been no decision
15 on it, but I think you make a good point that in
16 the event that they're not put back into this
17 regulation, then I think that -- I don't know
18 that it would be an extensive rulemaking, but a
19 rulemaking on the BIA Road Maintenance Program --
20 regulations for the BIA Road Maintenance Program
21 may be useful.

22 It's addressed already in the BIA

1 Manual, but it's a very short provision that's in
2 the manual.

3 MR. GLAZE: Yes, it's not much.

4 MR. GISHI: Thank you, Andy. Thank
5 you, Jim.

6 Tribal Transportation Program is at
7 930. Of course this was a big part of the
8 discussion, negotiation and really what tribes
9 are looking at under the current rule. That was
10 to be able to establish tribal transportation
11 departments. Prior to this it was basically a
12 contract-by-contract, project-by-project
13 endeavor. This was one of the things that I
14 think led to it. And this is one of the areas I
15 think where Jim is exactly right. This is where
16 we took some initiative to go out and interpret
17 that to mean that this was basically available
18 for tribes to be able to do the very same things
19 that they were doing in Chapter 1 of Title 23,
20 which is primarily the federal aid side
21 applicable to states.

22 There's no significant changes there.

1 Did update some of the current programs and
2 statutes simply because those have changed
3 through the consolidation of the programs as a
4 whole.

5 Resolving disputes. 934 and 935
6 outline the alternative dispute resolution
7 processes that are available. There's no major
8 changes on this. Again, this was part of what
9 was currently in the regulations, but it did
10 include a provision to make sure that the Federal
11 Highway programmatic agreements were covered
12 under this section also.

13 Other miscellaneous provisions. 941
14 and 942 primarily what is transportation research
15 in terms of what funds are available for that
16 process? What can be used for research?
17 Quality of life programs. Obviously if they're
18 eligible for the program under TTP, then those
19 are encouraged here and that's no changes from
20 the current regulation.

21 943, which describes the High Priority
22 Project Program, is not in there. And it

1 references what is a Tribal High Priority Project
2 Program? It's no longer in there. And obviously
3 that needs to be removed from there. It is no
4 longer found. But the information associated
5 with any programs that come about that may result
6 in that will be provided in the Web sites as we
7 go along.

8 And those of you who have seen the
9 administration's proposal under the GROW AMERICA
10 Act know that that's a provision that is in
11 there, at least from the administration's
12 standpoint of continuing to provide a program
13 that's, as Bob said, back into being funded under
14 Highway trust funds. Bob indicated that it is
15 available under the section that's non-highway
16 trust fund-related, but it hasn't been funded to
17 this point. This just identifies the -- from the
18 standpoint of -- as far as this program is
19 concerned is no longer applicable, not part of
20 the TTP Program, but there is information that
21 needs to be put forward. If we have a program
22 that's implemented, it certainly will be provided

1 there as part of the Web sites at Federal
2 Highways and BIA.

3 Questions?

4 (No audible response)

5 MR. GISHI: I guess we didn't have a
6 question, a second question.

7 This basically concludes the end of
8 the regulations out there. If there are any
9 general questions or anything that anybody wants
10 to come back, we'd be more than happy to cover
11 those as we go along here with the remainder of
12 the presentation.

13 MR. GEISLER: Secretary Adam Geisler,
14 La Jolla Band of Luiseno Indians. I should have
15 said this earlier, but La Jolla appreciates the
16 effort that's been made to hold this consultation
17 process today and we recognize that this is an
18 evolving and changing program. But with that I
19 think that there was a piece that was highlighted
20 earlier on in the day about the ability for funds
21 that tribes are eligible to participate in when
22 coming through states, that those funds can also

1 be then put back through Federal Highways and
2 then reassigned as TTP dollars to the tribes as
3 long as the activities are staying the same. A
4 number of tribes in the State of California are
5 starting to be awarded for different types of
6 projects that have been through competitive grant
7 processes, but the source of funds is federal.

8 And I don't know where it would land
9 in here, but I didn't see I guess a specific 170
10 dot something where this would fit. So maybe
11 it's something that needs to be added, but
12 recognizing maybe the statutes or laws that are
13 on the book that allow that to happen so that as
14 we have conversations with our state partners;
15 because I realize there's folks here from other
16 parts of the country, that we have something to
17 work with when we deal with their solicitor's
18 office and their legal representation Because
19 that's something that I know we at La Jolla would
20 really appreciate, a clearer understanding and
21 with an emphasis on the fact that based upon
22 those being TTP funds, that TTP guidelines now

1 apply to those as long as they're being used in
2 the way that the intent of the dollars were
3 situated or originated. Thank you.

4 MR. GISHI: Okay. If you note that in
5 Section 170.1 there -- this part provides rules
6 and funding formula for the DOI Program and
7 cooperation with DOT for the TTP Program.
8 Included in this part are other Title 23 and 25
9 transportation programs administered by the
10 Secretary of the Interior and the Secretary of
11 Transportation. Basically in the previous reg we
12 referred them as other Title 23 funds, and so the
13 intent was not to remove that for that purpose,
14 but because that graph is out there, we had to
15 make sure we included those in there. But that
16 was the whole idea was to make sure that we had
17 -- if they were eligible for the program and we
18 find a way to be able to get them into the
19 process. And under the Title 25 authorities
20 we've been able to do that. And now with this
21 new provision that came about under MAP-21 that
22 continues to be the case also.

1 So, and what you're saying is to just
2 make it a little more clear, maybe more defined
3 as a separate question and answer so that aspect
4 of it can be answered.

5 MR. GEISLER: Exactly.

6 MR. GISHI: Okay. Yes?

7 MR. MACKAY: Jim Mackay, tribal
8 administrator, Susanville Indian Rancheria, M-A-
9 C-K-A-Y. We talked earlier that we're going to
10 go back to the definition of an access road. And
11 I don't think we fully expanded on that because
12 there is no definition of tribal boundary. So if
13 we can kind of talk about that and find out what
14 the definition of tribal boundary is and maybe
15 have that actually in the definition.

16 MODERATOR CAULUM: All right. When
17 the Congress was considering MAP-21, I remember
18 exactly where I was when these questions came
19 through on my email. I was in Billings. We were
20 consulting on Question 10. And Congress wanted a
21 definition of tribal lands. The members of the
22 committee did. And our colleagues at Federal

1 Highway initially thought that would be a great
2 idea. And at DOI we -- well, I pretty much
3 freaked out because --

4 (Laughter)

5 MODERATOR CAULUM: -- and we pushed
6 back extremely hard. And the reason was because
7 the last place that we wanted to have a
8 definition of tribal lands was in a
9 transportation bill that had nothing to do -- all
10 but 450 million of -- how many is it per year, 25
11 billion?

12 PARTICIPANT: Well, it's a lot of
13 billions.

14 MODERATOR CAULUM: A lot of billions.

15 PARTICIPANT: Forty.

16 MODERATOR CAULUM: I mean, of course
17 lawyer's world and lawyer's mind we look at it
18 like, great, now the next lawsuit we get
19 challenging whether lands are actually owned by a
20 tribe is going to look to a definition in a
21 transportation bill for the basis of how to
22 challenge whether a tribe actually owns those

1 lands or not or whether they're properly in
2 trust. I mean, some of you may be familiar with
3 this entire process, and it can be a mess. And
4 it was the last thing we needed to have happen.

5 So with that background, I will now
6 address this question. That is a good comment,
7 obviously. It's an important issue for access.
8 It is something that we will definitely consider
9 because it, I suspect, will be part of the
10 comments that we have to address as a result of
11 this meeting, as well as any written comments we
12 might get. And what the resolution of it is I
13 can't speculate on right now. But I thought it
14 might be helpful to understand sort of the
15 background of it.

16 And I know this is the Secretary of
17 Interior's rule, but that's a very, very
18 difficult subject for the Department of the
19 Interior because there's such disparity with
20 tribes across the country in terms of how they
21 hold lands and the definition of what Indian
22 Country is how courts view it, things of that

1 nature. So, but we will definitely address it.
2 And I mean, it is an important issue certainly.

3 MR. GISHI: Okay. We brought up the
4 definition of access roads. Is there anything
5 more that we want to discuss on that? Anybody?
6 I know that this does refer to the tribal
7 boundary terminology in there. If not, certainly
8 we can bring up other things also. Yes?

9 MR. DeLIRA: Dave DeLira, Dry Creek.
10 Just my two cents, I guess. What I'd offer is I
11 would suggest that it not only include lands in
12 trust, but also fee lands, more specifically fee
13 lands that are contiguous to the trust property.
14 And I suggest that because we're talking about
15 this exact same road extended, access or not.
16 Even if it's a tribal road it's extended to fee
17 lands. Additionally, they were in process of --
18 they were applying for trust status as well. So
19 that status may or may not change. So just a
20 suggestion. Like I said, I would include
21 contiguous property that's held in fee.

22 MR. GISHI: Okay. Thank you. And I

1 don't know, Sheldon, if you were listening to
2 that, but I think currently this is -- correct me
3 if I'm wrong, but that's kind of how we're
4 handling the current inventory process of
5 including tribal transportation facilities in the
6 inventory is based on that idea, and that's where
7 the whole concept of the 15 miles also comes.

8 Because from a transportation perspective -- and
9 that's where Andy kind of has -- he has to worry
10 about what his aspect, his responsibility
11 associated with the Solicitor's Office. And from
12 our perspective on the transportation side we're
13 looking at it from the standpoint of
14 transportation services, you being able to manage
15 and providing access for the public to those
16 areas that you would consider. So that's a good
17 point. And I think that's kind of the way we're
18 doing it. But that's something to consider also
19 along that line, particularly if the Solicitor's
20 Office is brave.

21 Yes?

22 MR. SPRINGER: Hi, Tom Springer, Ho-

1 Chunk Nation. Back in -- I think it started in
2 2010, LeRoy, you did a PowerPoint that introduced
3 the concept of ADL, access determination line for
4 really what the one gentleman talked about, which
5 is the -- kind of defining the tribal boundary
6 for access roads. And at that time it was a two-
7 mile radius I think from a center point of a
8 trust parcel. And the Coordinating Committee
9 took that concept and really developed it. And
10 then the last time it was here in Sacramento
11 unanimously passed a concept building on your
12 original thoughts.

13 I'd like some feedback if possible on
14 if the BIA could implement that or incorporate
15 that concept into this regulation. I think that
16 would be very helpful and answer a lot of
17 questions that are now ambiguous.

18 MR. GISHI: A little bit of background
19 on that. When we were going through the process
20 it was primarily again geared toward establishing
21 a distance, a mileage. Why was that so critical?
22 Because the formula at that time was looking at

1 miles on an annual basis that were associated
2 with the different construction needs, different
3 ownerships, different classes of road that were
4 out there.

5 And so the result of that was is we
6 came up with what we interpreted to mean -- after
7 we had a chance to go to every location -- as
8 Andy said, it's very different with a lot of the
9 tribes out there. You have villages in Alaska
10 that basically in terms of what they've
11 identified as their service area are very much
12 different than what other tribes in the Lower 48
13 are considering as part of a service area or a
14 boundary of some sort.

15 So we tried to come up with something
16 that would kind of be universal across the board
17 that would allow us to be able to say this is the
18 line that we basically will establish for every
19 location and which now we can apply any type of
20 mileage distance from that location. And that
21 was that ADL, or whatever it was that Tom was
22 referring to. And we put that out there for the

1 Coordinating Committee to basically look at, and
2 they provided comments on it. And that became
3 the basis for actually our consultation sessions
4 that we had there in June and July of 2013 during
5 that process of identifying that whole idea of
6 where we were heading with the idea of proposed
7 and access roads as well as those other issues
8 that were there.

9 And of course overnight on that last
10 meeting, as we mentioned, it changed. There was
11 no longer a need to measure these roads. There
12 was no longer a distance that was associated with
13 a formula that could now be -- that everybody
14 would have to agree upon. Congress made the
15 decision.

16 The access road definition that was
17 developed at that time was primarily for one
18 thing: to satisfy the needs of the formula and
19 nothing else. And of course we allowed access
20 roads to get into the inventory, but we would
21 sometimes classify them as a different
22 construction need, maintenance only, and which in

1 that case they weren't including in the formula.

2 And so we were able to work with
3 tribes on a case-by-case basis to make sure we
4 got roads that sometimes would impact their
5 communities in terms of eligibility so it could
6 get into the inventory. But in terms of the
7 formula itself that was basically the
8 determination, that access data line that we were
9 looking at was for that purpose.

10 And now that we've come up with --
11 well, we haven't, but the Congress came up with a
12 way that it was going to measure the mileage and
13 the formula is pretty much set. We were looking
14 at now how do we now begin the process of
15 identifying access roads? Because whether you
16 get 15 miles in the inventory or you get 60 miles
17 into the inventory, at this point it's an issue
18 of eligibility. It's not an issue of the funding
19 formula anymore because those are pretty much
20 frozen in the formula process.

21 But if there is something that's
22 there, something that we'd encourage, I think we

1 still have those posted on the Web site for the
2 -- at the TTAPS. The Central Michigan and -- or
3 Eastern Michigan -- I forget where our TTAP site
4 is there -- and up at Northwest those are still
5 posted on there in the concept.

6 If this is something that individually
7 you would want, please let us know and we can
8 find that material, if you're looking at that as
9 a process to make comments on, this whole idea of
10 access roads. But again, it was primarily
11 designed to satisfy the formula -- debate the
12 formula discussion. There it is. He's got it.
13 That's one of those. And there was actually a
14 much larger presentation that showed -- that
15 talked about it in terms of just what we're
16 looking at and identified. It includes actually
17 provisions in there that are in this regulation
18 that talks about -- the road of next higher
19 functional classification was in that
20 presentation also.

21 MR. PINELL: Robert Pinell, Table
22 Mountain Rancheria, Tribal Culture Resources

1 Director. One comment on something that was
2 raised earlier today regarding requirements for
3 easements for tribal roads across tribal trust
4 land that doesn't involve third party properties.
5 Currently the rule is silent on the issue and I
6 think it provides a little confusion. We'd like
7 to see some clarity in the new rulemaking
8 regarding that lack of requirement for an
9 easement.

10 MR. GISHI: Right, and we know which
11 one you're talking about. Andy?

12 MODERATOR CAULUM: I'm sorry.

13 MR. GISHI: Third party, you know, the
14 situation we had at Table Mountain Rancheria?

15 MODERATOR CAULUM: I'm sorry. I
16 apologize. I was refreshing my recollection of
17 ADL. I apologize. Could you please repeat the
18 comment? I'm sorry. I apologize.

19 MR. PINELL: Sure. About the
20 discussion earlier today about the requirement
21 for an easement from tribes for tribal roads
22 across tribal community trust property --

1 MODERATOR CAULUM: Oh, okay.

2 MR. PINELL: -- that doesn't involve
3 third party properties.

4 MODERATOR CAULUM: Yes. Okay.

5 MR. PINELL: Some clarity in the new
6 rulemaking.

7 MODERATOR CAULUM: Okay. Yes, and we
8 will see if we can address that. As I mentioned
9 earlier, there's ongoing rulemaking for 25 CFR
10 169, which is the right of way regulations. I
11 think that one aspect of it that we will probably
12 have to consider is the fact that the current
13 regulation and law requires that you have a right
14 of way in place to build the road to begin with.

15 I think perhaps the more issue is
16 going to be the appraisal question for right of
17 way. Because obviously if the tribe is building
18 a road across its own trust lands and it doesn't
19 implicate any other ownership or property rights
20 of any kind such as an easement for utility or
21 something like that, there's really no purpose in
22 having an appraisal because there's no one that's

1 going to be paid anything. Those typically are
2 for a situation where a county or state might be
3 building a road or something of that nature.

4 So it might end up being just limited
5 to the waiving the appraisal aspect of it. And
6 like I had mentioned earlier, I've been working
7 from time to time on the 169 regs, so we may
8 address it there and then make a reference in
9 this regulation as well.

10 MR. GLAZE: Just to clarify your
11 point, you don't want to have a regulation. You
12 want to say you need a right of way --

13 MODERATOR CAULUM: Mr. Blaze.

14 MR. GLAZE: I'm sorry. Excuse me.
15 You wouldn't want to suggest you need a right of
16 way and then you're just waiving the appraisal,
17 because there's no transfer of properties. You
18 don't need a right of way. You need some kind of
19 dedication of the property as a public thoroughway
20 rather than a right of way. So that has to be
21 distinguished to avoid the confusion I think is
22 the point that was being made.

1 MODERATOR CAULUM: Okay. All right.

2 MR. GISHI: Thank you. Did you have
3 something, Sheldon?

4 MR. KIPP: (No audible response)

5 MR. GISHI: Did you have a comment on
6 that, Sheldon?

7 MR. KIPP: (No audible response)

8 MR. GISHI: Okay. You're just
9 highlighting it for us.

10 Any other questions or discussion?
11 Yes?

12 MR. EMAMI: John Emami, regional
13 consulting engineer. Regarding the access road,
14 we have tribes that are in remote area. Their
15 only means of access to the reservation or
16 rancheria is through the city, county or State of
17 California right of way. It's their right of
18 way. They say, oh, we are bankrupt. We don't
19 have any money to fix these roads, even though
20 it's our right of way. Tribe have some money,
21 but they can't afford to stand up to this
22 classification required by the State of

1 California or the city standard or the county
2 standard. They can come up with some kind of a
3 design that provide a nice road surface even
4 though is not up to the Golden State of
5 California.

6 Is there anything that tribe can find
7 a petition or put some kind of a rule or some
8 kind of a regulation that, look, if the tribe are
9 willing to pay from their own pocket in order to
10 have a decent access, you let us go through and
11 build this road so they can make the connection.
12 Because there are kind of surrender by these
13 access problem. They have nowhere to go.
14 They're sitting right in here. The only viable
15 access is through the city or county or State of
16 California roads. Anything we can do to help the
17 tribe?

18 I'm living in the State of California,
19 so I talk about the State of California, however,
20 this might be true for any other tribes. They
21 have some money because of the Tribal
22 Transportation Program, but is not that much.

1 They are not as rich as the State of California,
2 but they are willing to spend their money in
3 order to have a decent road so they can travel.
4 The road is cracked up, full of potholes, this,
5 that, inadequate drainage.

6 If you go to the city, county or the
7 state, oh, we don't have money. You know, bad
8 time, this, that. And all you get is a
9 runaround. So they're not going to come up with
10 the money. They're not going to come up with the
11 design. Yet tribe need to have a decent access
12 and they are willing to pay for this access so
13 they can travel. Get out of the confinement
14 because the location of the rancherias are in a
15 remote location. Is not that connectivity. It
16 is one-street vistas.

17 So is there anything that the tribe
18 can file a petition that, hey, if we come up with
19 the money, the construction dollar and the
20 design, you let us build this road without
21 holding us to that high of a standard that cost
22 so much money that we cannot afford? Yet you are

1 not fixing it because you have the right of way.
2 That is my comment in these access roads --

3 MR. GISHI: Thank you.

4 MR. EMAMI: -- to help the tribes out.

5 MR. GISHI: And basically that's a
6 problem that just doesn't persist here in the
7 State of California. We see that a lot out
8 there. And the process is that it mentions that
9 our state DOT is required to sit down with and
10 coordinate and consult with tribes. Under 134
11 and 135 of the planning process tribes are to be
12 included for roads that are on or near Indian
13 Reservations. That's a process to look at.

14 There's certainly abilities to be able
15 to do that. But you're right, there are some
16 instances where there is absolutely no
17 discussion. And we don't have too many of those,
18 but when we do, one of the areas to -- one of the
19 folks that we bring in is our counterparts at
20 Federal Highways to be able to do that.

21 Obviously the extent to which the road needs to
22 be completed you fit into that requirement of

1 roads not being maintained in a proper manner,
2 which there's a process in the regulation that
3 states what needs to be done, if that's the case,
4 that are basically subject to -- I believe it's
5 Section 316 of Title 23.

6 And so there are a number of things
7 that can be done, but ultimately the process of
8 making a project work like that is cooperation
9 and coordination. And unfortunately most of the
10 funds are on -- we've got a \$44 billion program
11 on an annual basis. That's pretty much a federal
12 aid program and which the tribes receive 450
13 million of that, which is very small in relative
14 comparison.

15 And of course you're addressing the
16 standards. Those are their standards. They're
17 responsible for those things, much like the tribe
18 would be responsible for standards that they were
19 implementing, projects that the state was either
20 going to build or wanted to improve for some
21 reason.

22 So in terms of what you're looking at,

1 that is an age old question of coordination and
2 collaboration and being able to make things work.
3 And in some cases it does work. Other cases, in
4 most cases it's a process that takes a lot of
5 time to be able to get to that point. So you're
6 not the only one that's in that situation.
7 Unfortunately that's how the program has
8 developed working through the federal aid program
9 with the states.

10 There are things that we can do and we
11 have done. One of them is to provide matching
12 funds in some cases to help make that. Any
13 number of things that you can do to help people
14 get an interest in being able to make those
15 improvements to those roads are what's there, and
16 it varies.

17 And I'm speaking to choir so to speak,
18 because a lot of those programs that we used to
19 have are no longer available under the
20 consolidated MAP-21 program, but there are --
21 recently we've had TIGER grants and a number of
22 other programs that have had availability for

1 funds out there. But even then you have to be
2 able to have the sponsorship of those agencies,
3 those other outside agencies to be able to do
4 that. But that's a good point.

5 MR. EMAMI: Okay. Thank you.

6 MR. GISHI: We were talking about this
7 during the break. If you have had a chance to
8 take a look at the cost to construct, that's a
9 data element that we used to -- and we do still
10 update that because Federal Highways wants that
11 report on an annual basis. And that's why
12 updating the inventory is very critical because
13 it's one of the data fields that helps us to be
14 able to let not just local governments, but also
15 state governments on a national basis.

16 The cost to construct for Indian
17 Country in terms of transportation systems is
18 over \$70 billion. And that continues -- has
19 really grown as a result of the improvement of
20 the inventory process in the last five years.
21 That basically means that that's how much you
22 would need to get the system to an adequate

1 standard that are out there that provides service
2 to or access to the tribes for their -- and the
3 public to tribal lands and tribal communities.

4 So you can pretty much imagine that
5 that's going to be a continuing process that's
6 out there. And that's why the long-range
7 planning process, the establishment of priority
8 lists and the TIPS are very important, because
9 that's where you have a chance to at least
10 prioritize what you have to be able to do that,
11 not just the tribes, but also the BIA working
12 with tribes. Good question.

13 Yes, Jim?

14 MR. GLAZE: Jim Glaze, Sonosky
15 Chambers. Just to that point there is the
16 ability under the existing regs and you -- the
17 changed regs. It's actually -- part of it's
18 right up there. If the tribes are -- if it's
19 going to be within a state or a county right of
20 way and the state or county are unwilling to
21 transfer right of way, which they -- that's the
22 first thing you could ask is if they're willing

1 to transfer right of way. But if it's a very
2 low-volume road, there are ASHTO technical
3 standards for low-volume roads, which I believe
4 Cal-Trans and most states have adopted and can
5 use for low-volume roads -- is the way to get
6 that done at a lower cost. So that's one -- I
7 think the existing regs do bring that out, but it
8 could be brought out even better on that.

9 The last thing I just wanted to raise
10 on the regs that's not in the regs that I think
11 would be beneficial for tribes is something that
12 we've been working on with Vivian and Bob, and to
13 some extent you and Andy, Leroy, of making sure
14 that tribal access to surplus and excess
15 equipment is available to tribes the way that it
16 should be available under the Self-Determination
17 Act. Tribes are supposed to be able to access
18 the GSA Access Web site and identify surplus
19 equipment and when you do identify it and it's
20 going to be used to carry out when you're TTP
21 agreements.

22 We have been advocating with Vivian

1 and Bob at Federal Highways that they need to
2 make that available to tribes that go with
3 Federal Highways, and BIA quite frankly could do
4 a better job of making sure that they get access
5 to that, because that's another whole source of
6 free equipment that -- where you just have to pay
7 for shipping, but there's a lot of benefit to
8 tribes having access to that.

9 Right now this is something that
10 should have been addressed really in the original
11 regs, but it would be a great thing to address it
12 in these regs, because all you would have to do
13 is make it clear that the same process that
14 applies for self-determination and self-
15 governance also applies in this context. And to
16 the extent that you're getting push backs from
17 higher ups at different agencies, making it part
18 of these regs might be a way to help break the
19 dam and make that happen.

20 But I would ask that tribes -- I just
21 want to make people aware of that, because it's
22 not in there right now. But if you want to have

1 better access to federal equipment and make sure
2 you get title to it when it's transferred, that's
3 a comment that would be good for tribes to give
4 to the -- in this rulemaking process. All right.

5 MR. GISHI: Thank you, Jim. Any other
6 comments?

7 (No audible response)

8 MR. GISHI: With that, I'll turn the
9 time over to Mr. Bob Sparrow to --

10 MR. SPARROW: No, we're done.

11 MR. GISHI: Well, I was going to have
12 you close it.

13 MR. SPARROW: You can close it. I'm
14 having a good time sitting right here.

15 MR. GISHI: I want to certainly thank
16 everybody for taking the time to come -- yes?

17 MR. PINELL: Just a quick question,
18 not a comment. Will we be able to get copies of
19 the transcripts for these meetings, and where
20 would be able to get those?

21 MR. GISHI: Yes, as a matter of fact
22 we hope to have them set up there tomorrow on the

1 Web site.

2 PARTICIPANT: The transcripts are
3 not --

4 MR. GISHI: Oh, the transcripts? I'm
5 sorry. These presentations will be on the Web
6 site tomorrow, is what we're looking at. The
7 transcripts, when we get them and we go through
8 the process, we will also post them like we did
9 the -- as they become available we'll put them up
10 there for people to have access to.

11 MR. PINELL: On the Web site?

12 MR. GISHI: Yes, on the Web site. Yes.
13 That will be on the BIA Web site. It won't be on
14 the consultation Web site. We have a little more
15 flexibility with that in house in terms of our
16 leadership. We have to go through 40 other
17 people if we do it on that consultation Web site.

18 Another comment, we're going to try
19 and get the side-by-side out so everybody has it
20 available to them also so that -- it's quite
21 lengthy, so Jim made a recommendation of printing
22 it. We're in California, Jim. We'd be killing a

1 lot of trees. So we can put it up there. You
2 can download that and have that available for
3 yourselves also to utilize.

4 And if there are any other -- you can
5 comment as many times as you want to. If you
6 have just simple comments that you want to make
7 regarding the presentation itself, anything,
8 please make that available to us either through
9 the Web sites that are available or the email.
10 Probably the quickest is the email. And that
11 information will get to us even before we finish
12 the consultation sessions that we have coming up
13 through mid-February.

14 So otherwise I wanted to thank you for
15 your time. Appreciate it. I know there are a
16 lot of folks here that are very experienced in
17 the program, the Tribal Transportation Program.
18 And it's a long ways in coming to get to this
19 point. We certainly appreciate your coming and
20 your patience, and look forward to hearing from
21 you. Thank you again very much.

22 (Applause)

1 MR. SPARROW: You all want to take a
2 break or you want me to just give a quick update
3 of the program?

4 MR. GISHI: What we're going to do, as
5 we mentioned, this is where the court reporter
6 shuts everything off, he packages things up, then
7 we'll talk about the TTP Program update as a
8 whole, as well as the dual-language
9 recommendation.

10 MR. SPARROW: So, 10 minutes.

11 MR. GISHI: Ten minutes. Come back
12 and we'll --

13 MODERATOR CAULUM: Just so we're clear
14 that the formal closing of the consultation on
15 the NPRM -- so we're going to be off the record
16 after the break. This will be the update I
17 referenced earlier in the morning. So any
18 comments on the update of the program, like I
19 said, that's not going to be part of the record
20 or anything like that. Okay? Thank you again.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:22 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Tribal Consultation on the Proposed
Rulemaking for 25 CFR Part 170

Before: US DED/OIA

Date: 01-13-15

Place: Sacramento, CA

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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