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# *Office of Inspector General*

# *Audit Report*

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## **OPPORTUNITIES EXIST TO STRENGTHEN FHWA'S COORDINATION, GUIDANCE, AND OVERSIGHT OF THE TRIBAL TRANSPORTATION PROGRAM**

*Federal Highway Administration*

*Report Number: MH-2014-003*

*Date Issued: October 30, 2013*





# Memorandum


**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation  
Office of Inspector General

Subject: **ACTION:** Opportunities Exist To Strengthen  
FHWA's Coordination, Guidance, and Oversight  
of the Tribal Transportation Program  
Report No. MH-2014-003

Date: October 30, 2013

From:

Joseph W. Comé   
Assistant Inspector General for Highway and  
Transit Audits

Reply to  
Attn. of: JA-40

To: Federal Highway Administrator

The Federal Highway Administration's (FHWA) Tribal Transportation Program (TTP)<sup>1</sup> provides funding for safe and adequate transportation and public road access to, within, and through tribal reservations, tribal lands, and Alaska Native Villages. TTP projects range from board roads for all-terrain vehicles on the marshy Alaskan tundra to significant road construction. According to FHWA's Office of Federal Lands Highway (FLH), over 8 billion vehicle miles are traveled annually on the TTP system, but more than 60 percent of its roads are unpaved and 27 percent of its bridges are deficient. From fiscal years 2005 to 2012, the TTP received about \$3.5 billion in congressional appropriations, including \$310 million provided by the American Recovery and Reinvestment Act of 2009 (ARRA). FLH and the Department of Interior's Bureau of Indian Affairs (BIA) jointly administer and oversee the TTP. Tribes enter into agreements with either FLH or BIA to receive funding for their tribal transportation projects and overall technical assistance on the program.

We initiated this audit to assess whether FLH is (1) effectively coordinating with BIA to administer and manage the TTP and (2) providing adequate oversight of TTP projects under agreements with tribes.

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<sup>1</sup> TTP was formerly known as the Indian Reservation Roads program. The Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21), which Congress enacted during this audit, changed the name of the program. In this report, we use the term "Tribal Transportation Program" or "TTP" to describe activities performed under the former Indian Reservation Roads program.

To perform our work, we reviewed laws, regulations, and guidance pertaining to the TTP and interviewed program officials from FLH and BIA. We selected a statistical sample of 10 tribes from across the country with FLH agreements. We conducted site visits to meet with tribal officials from these tribes and to review documentation for 31 projects that received TTP and ARRA funding. Exhibit A provides more details on our scope and methodology. We conducted our work in accordance with generally accepted Government auditing standards.

## RESULTS IN BRIEF

FLH and BIA routinely coordinate in key TTP areas, such as conducting reviews of tribal transportation programs. However, FLH and BIA have opportunities to improve coordination on National Environmental Policy Act (NEPA) approvals<sup>2</sup> and final acceptance of TTP projects. The existing agreements between FLH and BIA do not reconcile the two Agencies' different processes and requirements for NEPA approvals or reflect FLH's current role in assisting tribes. For example, FLH and BIA have different criteria for NEPA processes, which results in inconsistencies across the program when tribes acquire right-of-way<sup>3</sup> for construction projects. The agreements also do not address coordination between FLH and BIA on final project acceptance. BIA retains responsibility for project acceptance on BIA-owned lands or lands held in trust—even when a tribe has an agreement with FLH. In 4 of the 12 projects we reviewed on lands owned or held in trust by BIA, tribes did not receive project acceptance letters from BIA—indicating a lack of coordination between FLH and BIA to ensure tribes receive timely letters. Without project acceptance letters, tribes run the risk that BIA may require further changes to a project, which could increase project costs and cause schedule delays. Updated interagency agreements would clarify the responsibilities of each agency and help address coordination challenges between FLH and BIA.

Although FLH has developed some processes for reviewing the tribes' management of transportation projects, its oversight is not based on sufficient data on tribes' program risks and needs. We requested project and funding information for all completed projects and projects under construction for the tribes in our sample, but FLH did not provide accurate data for 7 out of the 10 tribes. For example, FLH provided information on projects that were not constructed, multiple entries for the same projects, and projects that were not funded by the TTP. Sufficient data on tribal transportation programs is important because it enables FLH to maintain effective oversight of the TTP as FLH accepts new tribes

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<sup>2</sup> NEPA requires Federal agencies to consider the potential environmental consequences of their project proposals, document the analysis, and make this information available to the public for comment prior to implementation.

<sup>3</sup> Right-of-way refers to real property and rights therein used for the construction, operation, or maintenance of a transportation or related facility.

and its workload increases. Since May 2012, FLH has signed agreements with five additional tribes. Without critical program and project information, FLH is hindered in allocating its staffing resources and targeting its oversight efforts where they are needed most. In addition, the TTP is governed by an outdated regulation and unclear guidance in some key areas on how to implement that regulation, such as allowable uses of funds. For example, several of the tribes we visited were unclear on whether TTP funds could be used to purchase construction equipment and pay for certain legal fees. As a result, it can be difficult for FLH and tribes to clearly understand and comply with program requirements. Insufficient data on program and project activities and unclear, outdated program guidance impedes FLH's ability to effectively advise tribes and ensure that projects meet Federal requirements.

We are making several recommendations to improve FLH's coordination with BIA and its oversight of TTP projects.

## **BACKGROUND**

There are currently 566 federally recognized tribes in the United States. Since 2005, Congress has allowed tribes that are financially stable and have adequate financial management capability to enter into agreements with FLH to provide Federal oversight of TTP projects and technical assistance. These agreements give eligible tribes the authority to manage their own tribal transportation programs, priorities, and projects, which is consistent with Federal policies that promote tribal self-government, self-determination, and sovereignty. FLH and BIA are jointly responsible for developing program policy and requirements. Prior to 2005, BIA managed all tribal transportation projects, and tribes worked directly with BIA to implement the program, while FLH provided technical assistance to the tribes through BIA in accordance with an interagency agreement.

Tribes now have the option to enter into agreements with either FLH or BIA to receive technical assistance to manage their own transportation projects. Depending on which option a tribe chooses, either FLH or BIA will fund and directly oversee the tribe's transportation program. As of June 2013, FLH has program agreements with 117 tribes. FLH has three divisional offices that provide program stewardship and technical assistance for tribal projects. Tribes may also pay FLH fees to perform related services, such as planning, research, engineering studies, and project development.

BIA's Division of Transportation is responsible for program policy, while BIA's 12 regional offices manage individual projects and interact directly with tribes. BIA retains responsibility for certain TTP project activities on BIA-owned lands or lands held in trust. BIA is also responsible for using a statutory formula to

determine the amount of annual TTP funding for tribes and manages the TTP inventory, a list of all tribal transportation facilities—such as public roads and bridges—eligible for TTP funding. BIA owns or holds in trust approximately 66 million acres of land for tribes, including tribes under agreements with FLH. Because of BIA’s trust responsibilities, BIA must provide final acceptance for all tribal transportation projects on these lands.

In July 2012, the Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21) authorized \$900 million for the TTP over a 2-year period. It also established a new formula that BIA uses to calculate the amount of annual funding distributed to tribes by BIA and FLH for transportation planning, design, construction, and maintenance activities.

## **OPPORTUNITIES EXIST TO IMPROVE COORDINATION BETWEEN FLH AND BIA ON ENVIRONMENTAL REVIEW AND PROJECT ACCEPTANCE PROCESSES**

FLH coordinates with BIA in several critical program areas, including (1) conducting program reviews, (2) distributing TTP funding to tribes, and (3) consulting with tribal organizations. FLH coordinates with BIA to conduct two types of program reviews. First, the Agencies conduct reviews of internal controls and program management of tribes with FLH agreements. Second, they evaluate BIA’s TTP administration at its 12 regional offices and provide recommendations for process improvements. In addition, BIA supplies FLH with information on the amount of funding to be sent to each tribe. FLH reviews this information and distributes the funding to BIA or FLH offices for final distribution to tribes. Finally, FLH and BIA coordinate joint meetings with tribes on program-wide TTP issues. For example, FLH and BIA have jointly coordinated consultation meetings with the tribes on issues such as proposed changes to the TTP regulation and the impacts of MAP-21. FLH and BIA also participate as non-voting members of the Tribal Transportation Program Coordinating Committee.<sup>4</sup>

Despite many examples of coordination between FLH and BIA, we found several coordination challenges that have not been addressed. First, FLH and BIA do not effectively coordinate on NEPA approvals for projects on BIA-owned lands or lands held in trust. Tribes with FLH agreements must receive NEPA approval from FLH before acquiring right-of-way for project construction. However, BIA retains right-of-way approval authority for projects on land it owns or holds in trust for tribes, even if the tribe has an agreement with FLH. FLH and BIA have

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<sup>4</sup> The Tribal Transportation Coordinating Committee consists of 12 tribal regional representatives and 2 non-voting Federal representatives (FLH and BIA). The purpose of the committee is to provide input and recommendations to FLH and BIA in developing TTP policies and procedures.

different criteria for NEPA processes for similar right-of-way conditions. These criteria determine whether the tribe may obtain a categorical exclusion, which declares that the project does not have a significant effect on the environment, or whether the tribe must prepare a more resource-intensive environmental assessment.<sup>5</sup> For example, BIA requires environmental assessments for existing roads if the tribe needs to establish or amend a right-of-way, whereas FLH grants categorical exclusions in these cases. Consequently, BIA determinations on the required level of environmental review could reverse FLH's decisions regarding NEPA requirements. According to FLH and tribal officials, BIA's requirement for environmental assessments—in cases when FLH does not require them—results in unnecessary effort, time, and cost for the tribes.

Further, FLH has encountered difficulties coordinating with BIA to ensure tribes receive timely final project acceptance letters. BIA regional offices are responsible for issuing acceptance letters for projects on lands owned or held in trust by BIA. These letters acknowledge completion of work and release the tribe from further project responsibilities. In addition, FLH requires these letters as part of each project's closeout report. However, BIA's regional directors have inconsistent approaches for issuing these letters. In 4 of the 12 projects we reviewed on lands owned or held in trust by BIA, tribes did not receive project acceptance letters from BIA. According to FLH and tribal officials, certain BIA regions are not participating in the project closeout process for tribes with FLH agreements. One BIA official stated that some regional staff may not want to accept projects because they were not involved in the planning, design, and construction processes. FLH procedures state that if BIA does not provide a letter of project acceptance within 30 days of a tribe's request, then the tribe should prepare a project closeout report and inform BIA it intends to close the project. Yet, BIA could overrule this determination at a later date, if it has not issued a project acceptance letter. Consequently, without project acceptance letters, tribes run the risk that BIA may require further changes to a project, which could increase project costs and cause schedule delays. FLH has an opportunity to assist tribes by coordinating more with BIA to expedite Federal approval processes and encourage more consistency among BIA's regional directors.

The coordination between FLH and BIA is inhibited by outdated interagency agreements that do not address how FLH should coordinate with BIA regional offices now that FLH is working directly with tribes. FLH and BIA established policies for coordination in a Memorandum of Agreement, which was last updated in 1992, and a Stewardship Plan, which was finalized in 1996. These key

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<sup>5</sup> Projects granted categorical exclusions do not have a significant effect on the environment and, therefore, do not require an environmental assessment or an environmental impact statement. An environmental assessment is prepared when impacts of a transportation project proposal are uncertain. The assessment is intended to provide evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

documents pre-date significant legislative changes to the program. In 1998 Congress directed FLH and BIA to establish a uniform set of policies and practices to jointly manage transportation infrastructure on tribal lands—which they have not accomplished to date.<sup>6</sup> In 2005, Congress changed FLH’s role in tribal transportation by authorizing FLH to enter into direct agreements with tribes.<sup>7</sup> FLH officials stated that they are working with BIA to update the interagency agreements, but the agreements have not been completed to date.

## **FLH’S TTP OVERSIGHT IS HINDERED BY INSUFFICIENT DATA AND UNCLEAR GUIDANCE**

Although FLH has developed some processes for reviewing the tribes’ management of transportation projects, its oversight approach is not based on sufficient data on tribes’ risks and needs. Consequently, FLH is hindered in establishing a data-driven, risk-based approach to allocating staff resources where they are needed most. Moreover, the TTP is governed by an outdated regulation and unclear guidance, so it can be difficult for FLH and tribes to clearly understand and comply with program requirements. Insufficient data and unclear program guidance impede FLH’s ability to effectively advise tribes and ensure that projects meet Federal requirements.

### **Insufficient Data on Tribes’ Risks Impedes FLH’s TTP Oversight**

FLH conducts oversight activities—such as occasional site visits—to review tribes’ management of transportation projects. All 10 of the tribes in our sample noted significant benefits in working with FLH. However, FLH’s oversight approach is not based on sufficient data on tribes’ risks and needs, which hinders its ability to allocate resources to tribes or program areas that need the most attention. Specifically, we identified weaknesses related to: (1) the accuracy of the data FLH used to monitor project and program activities, (2) insufficient review of tribal project management capabilities when on-boarding new tribes, and (3) the limited scope of site visits.

FLH lacks a database management system to track and monitor fundamental project and program activities. FLH has a simple document filing system to organize and store project documentation. This system backs up and updates information stored on regional employees’ computers onto a server. However, the filing system does not consolidate accurate project information or generate management reports that FLH staff can use to determine which tribes or TTP projects might warrant enhanced oversight. In addition, FLH had difficulty

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<sup>6</sup> Transportation Equity Act for the 21st Century (TEA-21), P.L. 105-178.

<sup>7</sup> Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFTEA-LU), P.L. 109-59.

compiling project status, funding, and scope information that we requested during our review.

Specifically, FLH provided us with inaccurate TTP project information for 7 out of the 10 tribes in our sample. We requested project and funding information for all completed projects and projects under construction for the tribes in our sample. However, FLH provided information on projects that were not constructed, multiple entries for the same projects, and projects that were not funded by the TTP. The lack of a centralized database management system runs counter to Federal internal control standards, which state that a successful monitoring strategy should include information that would provide routine feedback on operations and allow an agency to promptly identify problems that can impede the achievement of program objectives.

When on-boarding new tribes, FLH emphasizes administrative tasks, such as signing agreements, rather than assessing tribes' capabilities and preparing tribes to manage their own transportation projects. FLH does not coordinate with BIA to review a tribe's past performance in managing federally funded projects until after the tribe signs the program management agreement, well after it would be prudent to fully understand the tribe's capabilities and technical assistance needs. For example, during on-boarding, FLH does not formally assess each tribe's transportation program risks, or provide systematic training on its program requirements and the tribes' responsibilities in managing transportation projects. One tribe's transportation department informed us that it was unprepared to transition to FLH. According to tribal officials, FLH established an agreement with tribal leadership without fully exploring the tribe's capabilities or having direct discussions with the transportation department. This tribe previously had a program management agreement with BIA that provided direct Federal oversight. However, under FLH agreements, tribes assume greater responsibility for their transportation programs—underscoring the need for FLH to understand how to target its oversight activities so that tribes are positioned to effectively manage federally funded projects.

After a tribe enters into an agreement, FLH assesses the tribe's program management capabilities—a process of gathering data through site visits and other communications and employing a risk matrix with categories addressing topics such as past performance on single audits,<sup>8</sup> financial management, planning, and construction capability. However, FLH's site visit template does not contain a standard checklist to assess tribes' compliance with contract and construction

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<sup>8</sup> The Single Audit Act requires State or local grantees and tribal governments to maintain a system of internal control over Federal programs to demonstrate compliance with pertinent laws and regulations. Independent single audits are conducted annually, in accordance with Office of Management and Budget Circular A-133, to determine whether grantees are complying with these requirements.



management requirements. As a result, the site visit reports we reviewed lack sufficient detail on relevant risks and are inconsistent in scope and content from one report to another. Without detailed and consistent site visit data, FLH is unable to make meaningful comparisons between tribes regarding their levels of compliance with Federal requirements. Comparisons would allow FLH to focus attention on high-risk tribes and identify emerging risks across the program.

FLH's site visits and risk management activities have not been sufficient to consistently ensure compliance with TTP requirements. In some instances, tribal oversight of contracting activities did not meet Federal standards for administering and monitoring construction projects. Four of the 10 tribes we visited made payments to contractors without first comparing the contractor's payment request to the tribes' independent documentation and assessments of work completed. In addition, one tribe approved a change order valued at over \$100,000 without an independent cost analysis to support additional work under the contract. TTP standard operating procedures require a cost analysis for change orders when there is a lack of competition. We also found that some tribes' projects did not have health and safety certifications as required under the tribal program agreements. Moreover, two tribes in our sample were not aware of the requirement to provide FLH with as-built documents, which are plans revised to include all changes made to the original design, once a project is completed.

Insufficient information limits FLH's ability to appropriately target new and existing staff resources to effectively meet program goals. Adequate information on tribal transportation programs is important because FLH's workload continues to increase as it accepts new tribes. Five tribes have entered into agreements with FLH since May of 2012. In response to these additional demands on program staff, FLH recently completed a workforce assessment that resulted in the approval of four additional program staff.

### **TTP Lacks an Updated Regulation and Comprehensive Guidance for Program Implementation**

The TTP is governed by an outdated regulation that does not reflect FLH's current role and responsibilities in the program. FLH and BIA are jointly responsible for updating the TTP regulation but have not issued a new regulation reflecting significant legislative changes. The last TTP regulation was published in 2004. Since that time, Congress has passed two significant pieces of legislation impacting the program: SAFETEA-LU in 2005 and MAP-21 in 2012. SAFETEA-LU authorized FLH to enter into program agreements with tribes, but this important change—the basis of FLH's current program—is not reflected in the TTP regulation. The MAP-21 transportation authorization, passed last July, amended the formula that determines tribal funding.

FLH and BIA have been in the process of updating their regulation since the passage of MAP-21. FLH and BIA have developed draft regulatory language and held consultation meetings with tribal stakeholders to discuss program policies.<sup>9</sup> According to FLH officials, they deferred updating the regulation due to the expiration of SAFETEA-LU in 2009 and the anticipation of a new transportation authorization that could have significant impact on the program. However, this did not occur until 2012. While we understand the complexities of issuing regulations that impact sovereign tribal governments, a new program regulation is critical to define the Agencies' roles and responsibilities and ensure the efficient and effective management of the program.

Some aspects of both the TTP regulation and FLH's program guidance are unclear, particularly regarding allowable uses of TTP funds. The TTP regulation specifies many of the allowable uses of TTP funds, such as administrative expenses. However, neither the regulation nor FLH guidance specifies what types of legal expenses can be paid for with TTP funds. Consequently, one tribe used program funding for legal fees to defend against allegations made by another Federal agency, which is not allowable under Federal grant requirements.<sup>10</sup> Moreover, FLH guidance on allowable equipment purchases does not clearly align with the TTP regulation. Specifically, the TTP regulation states that tribes can use program funding to purchase equipment for maintenance activities, but FLH guidance and the TTP regulation do not specify whether equipment purchases for construction activities are allowable. As a result, the tribes in our sample had different interpretations of eligible equipment purchases. Of the 10 tribes we visited, 2 tribes bought equipment for construction, and 1 tribe stated that it did not buy equipment because it was not sure if the expense was allowable.

In addition, FLH has not adequately defined what series of remedial actions it could take for tribes not complying with TTP requirements. FLH's only available remedial actions are to suspend funding or terminate its agreement with a tribe when serious violations occur. Even though some tribes in our sample did not meet requirements related to program management and allowable uses of funds, FLH's remedial actions were determined on a case-by-case basis and the individual judgment of program staff. In contrast to FLH, other Operating Administrations have developed guidance for remedial actions, which is intended to encourage recipients to comply with program requirements and properly manage Federal funds. For example, the Federal Transit Administration's (FTA) guidance generally describes a continuum of remedial actions that FTA regional offices can take for high-risk grantees. These actions include written notifications

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<sup>9</sup> Executive Order 13175, Nov. 6, 2000, requires FLH and BIA to engage in regular consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

<sup>10</sup> Office of Management and Budget Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments, June 9, 2004.

of noncompliance and phased restrictions on funds until corrective actions are completed. Because TTP lacks a structured process for escalating remedial actions, FLH cannot ensure it provides consistent and effective oversight to tribes carrying out transportation projects.

Finally, FLH does not have clear guidance regarding Tribal Transportation Improvement Programs, 5-year transportation project plans that tribes are required to submit to FLH for review and approval. FLH's reviews are intended to ensure that proposed projects are eligible and financially constrained<sup>11</sup> by sufficient and reasonably available resources. However, FLH guidance does not specify what funding sources FLH considers to be reasonably available. As a result of unclear guidance, tribes sometimes do not include sufficient project information for FLH to determine risks in the tribes' transportation projects and programs, and ensure financial constraint. For example, FLH approved one plan without verifying the availability of a \$6-million discretionary grant to fund a project. Ultimately, the tribe was never awarded the grant. FLH's guidance also does not specify the amount of detail tribes should provide on project schedule, scope, and funding. One tribe's approved plan included funding requests for 5 years of preliminary engineering for two projects, which is unusual for projects of smaller scope and duration typically found in the TTP program. The plan also does not include sufficient information on construction timeframes and cost to support FLH's decision to approve the plan.

## **CONCLUSION**

The Tribal Transportation Program is undergoing a significant transition as FLH implements recent changes from MAP-21 and takes on oversight responsibility for more tribes. Tribes are also assuming greater responsibilities for managing their own transportation programs, in accordance with congressional intent. The ultimate success of the evolving TTP depends on effective consultation, guidance, and coordination between FLH and BIA. However, FLH can do more to coordinate with BIA and move toward a data-driven, risk-based approach to tribal program oversight. FLH can also improve the clarity and completeness of TTP guidance to ensure that tribes fully understand and comply with Federal requirements. By taking a more proactive approach with both BIA and the tribes, and improving current processes, FLH can enhance its stewardship of billions of dollars of Federal funding.

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<sup>11</sup> FLH states that, under 23 CFR 450.104, the planning process must show that a tribe can implement its projects using committed, available, or reasonably available revenue sources, with reasonable assurance that the federally supported transportation system is being adequately operated and maintained.

## **RECOMMENDATIONS**

We recommend that the Federal Highway Administrator:

1. Coordinate with BIA to update the Memorandum of Agreement and Stewardship Plan to reflect FLH's role to directly assist tribes, and define coordination between FLH and BIA regional offices.
2. Create a centralized database to capture financial and status information for tribal transportation projects.
3. Develop a process that ensures sufficient consultation with BIA for tribes transitioning to FLH, and requires FLH to consistently assess tribal capabilities and associated risks in administering transportation programs.
4. Develop a process that ensures consistent and comprehensive reviews of tribal projects, including a standard site visit checklist of key risk areas for the tribes.
5. Coordinate with BIA to revise the TTP regulation to reflect FLH's role to directly assist tribes and clarify the requirements for allowable uses of funds.
6. Design a series of remedial actions that FLH officials can take for tribes not meeting program requirements.
7. Revise Tribal Transportation Improvement Program guidance to ensure consistent definitions of key terminology, particularly financial constraint, and require tribes to provide more detailed information on project scope and funding sources.

## **AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE**

We provided FHWA with our draft report on August 20, 2013, and received its formal response on October 8, 2013. FHWA's response is included in its entirety as an appendix to this report. In its response, FHWA fully concurred with all seven of our recommendations and provided appropriate planned actions and timeframes. We consider all seven recommendations resolved but open pending completion of the planned actions.

## **ACTIONS REQUIRED**

FHWA's planned actions and timeframes for all seven recommendations are responsive, and we consider the recommendations resolved but open pending completion of the planned actions.

We appreciate the courtesies and cooperation of Federal Lands Highways representatives and tribal officials during this audit. If you have any questions concerning this report, please call me at (202) 366-5630 or Gary Middleton, Program Director, at (202) 366-0625.

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cc: FHWA Audit Liaison, HCFM  
DOT Audit Liaison, M-1

## **EXHIBIT A. SCOPE AND METHODOLOGY**

We conducted our work from May 2012 through August 2013 in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Our audit assessed whether Federal Lands Highway (FLH) is effectively coordinating with the Bureau of Indian Affairs (BIA) to administer and manage the Tribal Transportation Program (TTP). We also assessed whether FLH is providing adequate oversight of TTP projects under agreements with tribes.

To assess whether the FLH and BIA were coordinating effectively, we met with officials at FLH, Department of Interior (DOI) BIA, DOI Office of Self Governance (OSG), and DOI Office of Inspector General. We also collected and analyzed relevant regulations, agreements, and documentation related to FLH and BIA's joint administration of the program. Additionally, we interviewed tribal transportation officials and collected relevant documents to gain an understanding of the tribes' experiences regarding coordination between FLH and BIA.

To assess whether FLH is providing adequate oversight of projects contracted directly with tribes, we interviewed officials from FLH, BIA, and tribal governments. We examined TTP program regulations, policies and procedures as well as other standards, such as Government Accountability Office (GAO) Standards for Internal Control. We also visited the Western Federal Lands Office; attended 2 tribal consultations held by FLH and BIA; and conducted site visits to 10 statistically selected tribal entities, including reservations, tribal lands, and an Alaska Native Village Consortium. During the site visits with the tribes, we conducted interviews and reviewed program and project documentation to gain an understanding of program and project management practices across the sample of tribes. We developed a standard checklist based on Federal requirements and reviewed tribal records to assess the tribes' management of their transportation programs. Similarly, we conducted interviews with FLH and reviewed program and project documentation, using a similar methodology as used with the tribes. We assessed FLH's oversight of these programs by examining specific program and project records, such as documents required in the program agreement.

To review tribal project controls, we selected a statistical sample from data we received from FLH in two stages. For Stage 1, we stratified the universe of 63 tribes—that had program agreements with FLH and at least one active or completed construction project—into two strata: (1) Alaska tribes and (2) all other

tribes. For the purposes of this report, the term “tribe” includes individual tribes, Alaska Native Villages, and consortiums of tribal entities. We then selected 2 out of 31 tribes from Stratum 1, and 8 out of 32 tribes from Stratum 2, for a total of 10 out of 63 tribes. The 10 tribes were selected with probability proportional to the amount of funding they received in fiscal year 2011. The 10 tribes selected had received \$40 million in funding, which was 47 percent of the \$86 million in our Stage 1 universe for all 63 tribes. For Stage 2, we stratified projects by tribe and type of funding: (1) ARRA and (2) non-ARRA. We selected a total of 42 out of 87 projects where the probability of selection was proportional to a project’s estimated construction cost. These 42 projects had a total estimated construction cost of \$229 million, which was 78 percent of the \$294 million in our Stage 2 universe for all 87 projects. Because we were not provided with accurate data from FLH, our review of projects changed in many instances when we arrived on site. We conducted site visits at tribal locations to review projects within our sample. During two tribal site visits, we added projects to replace those that did not meet our criteria. The locations for our site visits were based on project activity as indicated by the FLH and confirmed by the tribes, and we did not make projections based on site visits.

**EXHIBIT B. MAJOR CONTRIBUTORS TO THIS REPORT**

<b><u>Name</u></b>	<b><u>Title</u></b>
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## APPENDIX. AGENCY COMMENTS



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

Subject: **INFORMATION:** Federal Highway  
Administration (FHWA) Response to Office of  
Inspector General (OIG) Draft Report on the Tribal  
Transportation Program (12U3004M000)

Date: October 08, 2013

From: Victor M. Mendez  
Administrator

In Reply Refer To:  
HCFM-1

To: Calvin L. Scovel III  
Inspector General (J-1)

The Tribal Transportation Program (TTP) provides funding for transportation planning, research, maintenance, engineering, rehabilitation, and construction of roads and bridges that provide access to, within, or adjacent to tribal lands. As a result, TTP funding provides better and safer access to basic community services, such as schools, work, and medical and emergency services, for the 566 federally recognized sovereign tribal governments across the country, enhancing quality of life in the mostly rural environments of Indian country. The TTP also promotes access to tribal lands for commerce and economic growth within tribal communities. More than 8 billion vehicle miles are traveled annually on the TTP system, even though it is among the most rudimentary of any transportation network in the United States with more than 60 percent of the system unpaved.

The TTP promotes a coordinated approach to highway construction in Indian country on roads owned by the Department of the Interior's (DOI) Bureau of Indian Affairs (BIA) or sovereign tribal governments, and other roads owned by States, counties, or localities that provide access to or within Indian communities. Since DOI is the lead Agency for updating TTP regulations, the BIA is a critical partner to ensure the successful delivery of the TTP as Congress expands FHWA's role with each successive surface transportation authorization act.

One of the changes Congress has made to FHWA's role in the program is that Tribes now have the option to carry out their transportation program directly through FHWA. The number of Tribes opting to work directly with FHWA has increased from the initial 4 in 2006, to the current number of 117 Tribes. In recognition of tribal sovereignty and the issues that some of the Tribes experienced with the BIA regions in the past, FHWA has never demanded timeframes for tribal requests to transfer their TTP to FHWA. Instead, FHWA works with the Tribes and BIA to make the transfer as seamless as possible at any time during the Fiscal Year. In many cases, these funds are the only transportation funds that a Tribe receives, and FHWA

focuses on providing the technical assistance necessary to make the Tribes successful.

In response to the increasing number of participating Tribes each year, FHWA proactively carries out both tribal risk and workforce analyses in order to identify the capacity of each Tribe and the impact that each Tribe has on the FHWA tribal transportation team workload. When identified, the FHWA Federal Lands Divisions and Federal-aid Division offices also provide technical assistance and direct on-site support to the Tribes and the team.

The FHWA is committed to supporting the Tribes to help ensure the successful delivery of the TTP. The delivery of a successful TTP is challenging as the number of Tribes working directly with FHWA continues to increase along with the varying size and technical capacity of each tribe, while recognizing the unique factors required by tribal sovereignty. The FHWA's revised process for taking on additional tribes, our continued work with BIA to update the TTP regulations, and our expanded stewardship and oversight approach will help FHWA address the OIG's recommendations and provide comprehensive oversight of the TTP.

### **OIG Recommendations and FHWA Responses**

**Recommendation 1:** Coordinate with BIA to update the Memorandum of Agreement and Stewardship Plan to reflect the FHWA Federal Lands Highway's (FLH) role to directly assist Tribes, and define coordination between FLH and BIA regional offices.

**Response:** Concur. The FLH and the BIA have agreed to jointly develop a National Business Plan (NBP) to identify the roles and responsibilities of each Agency and FHWA's increased role in the direct assistance to Tribes. The NBP will replace the Stewardship Plan to help further the BIA and FHWA as true partners and provide a uniform and consistent delivery and oversight of the program for the Tribes; thereby leading to a streamlined approach through resource sharing and eliminating redundant activities between our Agencies. The FLH and BIA leadership have approved the development of the NBP, and a joint-agency team effort for development is underway. The expected completion date for this activity is April 2014. The new NBP will address FLH's role to directly assist Tribes and define the roles and responsibilities of both BIA and FLH.

**Recommendation 2:** Create a centralized database to capture financial and status information for tribal transportation projects.

**Response:** Concur. With the additional Tribes opting to work directly with FHWA, the amount of data FHWA collects and uses has rapidly expanded. The ability to access a centralized data base will only strengthen the uniformity in program delivery and oversight. The FHWA has entered into a formal agreement with the Volpe Center to review the data that is currently collected, review the existing systems at FHWA, and recommend a course of action for our use. The FHWA intends to make the resulting database available to all TTP team members and to the Regional Road Engineers of the BIA. We expect the database to be

## **Appendix. Agency Comments**

in place by September 2014. Upon full implementation, these items will fulfill the intent of this recommendation.

**Recommendation 3:** Develop a process that ensures sufficient consultation with BIA for Tribes transitioning to FLH and requires FLH to consistently assess tribal capabilities and associated risks in administering transportation programs.

**Response:** Concur. The FHWA has developed a formal process to bring Tribes onboard that includes early communication with BIA to discuss transitioning a Tribe and completion of a tribal risk assessment. This process will help FHWA to understand the capacity of the transitioning Tribe regarding transportation and determine what level of technical assistance and oversight FHWA will need to provide. Overall, the process will provide improved consistency in the risk and workforce assessments that are implemented. Upon full implementation starting in October 2013, the policy/process will fulfill the intent of this recommendation.

**Recommendation 4:** Develop a process that ensures consistent and comprehensive reviews of tribal projects, including a standard site visit checklist of key risk areas for the Tribes.

**Response:** Concur. The FHWA has carried out site visits and formal program reviews of the Tribes since 2006, when the first Tribes opted to begin working directly with FHWA. Over the years and with input from other FHWA offices, the formal program reviews have become more risk-based, and they continue to emphasize overall program and project management. With regard to project reviews, FHWA has developed a draft, detailed list of the activities and documents that we will check and verify during future tribal project site visits. We expect to have this list in place beginning in Fiscal Year 2014. In addition, the updated TTP Program Guide will include this checklist so that all Tribes will have a reference source that describes the intentions and expectations of site visits by FHWA and BIA. In April 2014, the FHWA expects to have the updated Program Guide finalized and in place. Upon full implementation, these items will fulfill the intent of this recommendation.

**Recommendation 5:** Coordinate with BIA to revise the TTP regulation to reflect FLH's role to directly assist Tribes and clarify the requirements for allowable uses of funds.

**Response:** Concur. The DOI is in the process of updating the TTP regulations, Part 170 of Title 25 of the Code of Federal Regulations (25 CFR 170), and FHWA will coordinate with BIA as part of the rulemaking process. This update reflects the changes to the TTP brought about by the passage of MAP-21, and updated processes and procedures that have been in place since the original publication of 25 CFR 170 in 2004. The DOI developed and published a draft update in the Federal Register this past spring with a request for comments and held several formal consultations on the draft update. The DOI received numerous tribal comments and is currently considering those comments in the next step of the process, which is to formally develop a Notice of Proposed Rulemaking (NPRM).

The DOI is the lead agency for this regulation. After publication of the NPRM, expected in fall 2014, DOI will hold additional tribal consultation meetings around the country. After the completion of the formal NPRM process, DOI will again consider comments and a final rule may be developed and published. Due to the timeframes involved in the NPRM and consultation processes, DOI hopes to take the next regulatory action by the end of Fiscal Year 2014. Publication of the new regulation will fulfill the intent of this recommendation.

**Recommendation 6:** Design a series of remedial actions that FLH officials can take for Tribes not meeting program requirements.

**Response:** Concur. The TTP Delivery Guide will identify remedial actions, and the Agency will discuss these actions during the annual face to face meeting and as part of the new process to bring Tribes onboard as mentioned above. The remedial actions will identify measures that FLH will take in response to a Tribe's non-responsiveness to issues identified or reporting that is required by the Program Funding Agreement, single audit findings, or program reviews. The FLH will notify BIA and request assistance when necessary. We expect the NBP and updated Program Delivery Guide to be complete and in use by April 2014. The remedial action plan in the Program Delivery Guide and future Program Funding Agreements, and the discussion of these remedial steps as part of the process to bring the Tribes onboard, will fulfill the intent of this recommendation.

**Recommendation 7:** Revise Tribal Transportation Improvement Program guidance to ensure consistent definitions of key terminology, particularly financial constraint, and require Tribes to provide more detailed information on project scope and funding sources.

**Response:** Concur. The FHWA's Transportation Improvement Program (TIP) forms are generated by the Tribes to reflect the tribal projects and activities, and the comment box on the TIP is used by the Tribes to provide additional project and activity information, such as additional funding sources. Since the law states that all projects and activities must be on an approved TTP TIP, a tribe uses the forms to identify everything it wishes to spend TTP funds. The FHWA will work more closely with the Tribes to help them provide useful and accurate information on the TTP TIPs. We will also identify the description and instructions related to this document, including terminology, in the update of the regulation and program delivery guidance. This process will take place during the Fiscal Year 2014 updates to the TTP TIPs and will fulfill the intent of this recommendation.

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The FHWA recognizes the importance of the TTP program and is committed to work with BIA to deliver transportation projects that provide multimodal access to basic community services for the 566 federally recognized sovereign tribal governments. The results from this program will enhance livable communities and the quality of life of tribal residents by

providing safer all weather access to schools and healthcare facilities and improved opportunities for economic development on tribal lands.

The FHWA appreciates the opportunity to respond to the OIG draft report. If you have any questions or comments regarding this response, please contact Joyce Curtis, Associate Administrator for Federal Lands, at (202) 366-9472.