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What is Tribal Transportation?

The heart of Tribal Transportation is planning. It is the government-to-government relationship between the Department of Transportation and Tribal governments regarding roads, paths, and bridges which impact land use, culture, economic, social, and/or environmental quality of life for the area covered by a proposed plan. Tribal Transportation can be either roads connecting to Indian Country, or Indian Reservation Roads (IRR).

Why do we have Tribal Transportation?

Like any other communities, Tribal communities need adequate roads, paths, and bridges for access to health care, employment, schools and other services. Tribal Transportation programs are a coordinated effort between tribes and transportation providers to meet the needs of often isolated Tribal communities by using the most efficient and cost-effective method.¹ Strategic planning between Tribal governments and State and Federal transportation providers is the critical process in all Tribal Transportation projects.

What is the history of federally-required transportation planning for roads leading to and within reservation boundaries?

The concept of cooperative planning between the states and the federal government began in 1921 when States were required to perform highway planning surveys as a condition to receiving Federal funding. Since 1921, Congress has continued to emphasize planning and cooperation between States and the Federal government as a requirement of federal funding for highways and roads.² Increasingly with time, local governments, environmental groups, even community members in areas affected by the transportation projects participated in the planning process.

On May 22, 1983, the Bureau of Indian Affairs (BIA) and the Federal Highway Administration (FHWA) entered into a Memorandum of Agreement to include planning for Indian reservation roads so that an agency can receive money for these projects.³ In 1998, Congress passed the Federal Lands Highway Program (23 U.S.C.A. §204), which codified tribal transportation planning. In its third and current version, 23 U.S.C.A. §204(j) titled **Indian Reservation Roads (IRR) Planning** states, “ *Up to 2 percent of funds made available for IRR for each fiscal year shall be allocated to those Indian Tribal Governments applying for transportation planning...*” (emphasis added)⁴

In summary, the emphasis on Tribal Transportation planning began with the Federal government mandating that the States participate in a planning process to receive Federal funding for highway construction and maintenance. Later Congress recognized the importance of Tribal Government participation in the planning process.

¹ <http://www.ctaa.org/ntrc/rtap/pubs/ta/am-ind.asp>

² <http://www.fhwa.dot.gov/flh/reports/indian/chapter1.htm>

³ <http://www.fhwa.dot.gov/flh/reports/indian/chapter1.htm>

⁴ Federal Lands Highway Program 23 U.S.C.A. § 204 (j) (West, Westlaw through 2007)(effective August 10, 2005)

What factors are considered in the Tribal Transportation Planning process?

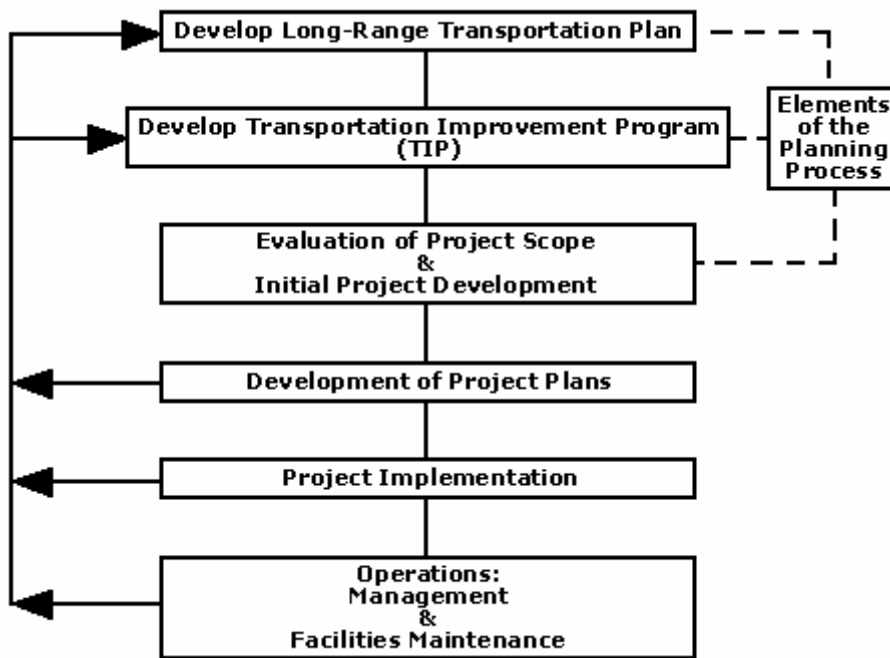
An important thing to remember with all transportation planning is that a good plan is continual and comprehensive. Planners have to balance present transportation conditions with future expectations. Tribal Transportation planning is unique because it must balance the needs of different governments: Tribal, Local, State, and Federal governments. Additionally, interested parties like special interest groups, government agencies, even local grassroots people have an opportunity to participate in the planning process.

Factors that are considered in Tribal Transportation planning are cultural preservation, future enterprise, community access needs, current road conditions, maintenance needs, community social structure, location of schools and services, and the legal status of different parcels of land.

Figure 1 shows the basic steps of transportation planning decisionmaking.

Figure 1

Transportation Planning Decisionmaking⁵



⁵ <http://www.fhwa.dot.gov/flh/reports/indian/chapter1.htm>

What else is involved in Tribal Transportation besides planning?

Along with short-term and long-term planning, Tribal Transportation includes the design and development of the project plans; the competitive bidding process for the different contracts associated with the plans; the construction of the plans; and the management and maintenance of the project. All of these components are needed for the building, fixing, or maintenance of roads, bridges, bike paths, and trails. Finally, it is important to keep in mind that transportation planning does not and should not stop with the completion of a project. The Bureau of Indian Affairs keeps inventory of Indian Reservation Roads and can be viewed online at

http://www.doi.gov/bia/indianresroads/Midwest_report.PDF

What is the Indian Self-Determination and Education Assistance Act (P.L. 93-638)?

The Indian Self-Determination and Education Assistance Act, enacted January 4, 1975 is arguably the most influential statute dictating Congressional Indian policy in modern times. The wording of the statute itself is the best explanation of this P.L. 93-638:

“An Act to provide maximum participation in the government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indian and to encourage the development of Human Resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities....”⁶

How does Tribal Transportation reinforce the Congressional goals of the Indian Self-Determination and Education Assistance Act?

The Indian Self-Determination and Education Assistance Act (P.L. 93-638) is aligned with the goals of the Federal Lands Highway Program (23 U.S.C.A. §204). The purpose of the Federal Lands Highways Programs is to create a uniform policy for all federal roads that are public roads to have the same policies as highways receiving Federal-aide⁷ (which is the majority—if not all of the highways in the U.S.). § 204 creates a rule that the Secretary of Transportation and the Secretary of the Interior must develop transportation planning procedures for Indian Reservation Roads have to be uniform to the inclusive planning procedures for metropolitan roads (23 U.S.C. §134) and for Statewide transportation planning (23 U.S.C. §135).⁸ Aside from making it mandatory that Tribes are included in transportation planning for all Federal public roads, the amended version of the Federal Lands Highway Program authorizes Tribes to contract directly with the Federal Highway Administration consistent with P.L. 93-638.⁹

⁶ Indian Self-Determination and Education Assistance Act (P.L. 93-638) § 1, 25 USC 450 (West. 2007)

⁷ 23 U.S.C.A. §204 (a) (1)

⁸ 23 U.S.C.A. §204 (a) (2)

⁹ 23 U.S.C.A. §204 (e) citing P.L. 93-638 (7)(a)

What kind of opportunities does a Tribe have for contracting under the amended version of the Federal Lands Highway Act as opposed to an earlier version of the law?

The amended version of the Federal Lands Highway Act reinforces tribal self-determination by allocating 25% of the funds for Indian Reservation Roads to go towards maintenance¹⁰ with no cap on money allocated for resealing reservation roads. Interestingly, earlier versions of Federal Lands Highway Act did not comport as well with P.L. 93-638. In its earlier version enacted June 9, 1998 to August 9, 2005, 15% of the funds for Indian Reservation Roads was allocated *for the purpose of road sealing projects* (emphasis added).¹¹

Similarly, the earlier version of the Federal Highway Administration Act delegated authority over maintenance projects on reservation roads to the Bureau of Indian Affairs,¹² while the amended (and current) version of the Act states that “...*a Tribe and a State may enter into a road maintenance agreement under which an Indian tribe assumes the responsibilities of the state* for (a) Indian Reservation Roads (emphasis added)¹³; and (b) roads providing access to Indian Reservation Roads...”¹⁴ Further, “[Tribal-State agreements] shall be negotiated between the State and the Tribe¹⁵ and *shall not require the approval of the Secretary* (emphasis added).¹⁶

In summary, Tribal Transportation is aligned with the Congressional intent of the Indian Self-Determination and Education Act (P.L. 93-638) because it insists on Tribal participation in the planning, approval, construction, and maintenance portions of transportation projects. Newer versions of transportation law impacting Tribal Transportation encourage greater Tribal participation that enhances economic development and allows Tribes to contract without BIA approval on maintenance of reservation roads.

So a Tribe can negotiate a contract with a State to provide maintenance for Indian Reservation Roads and roads connecting to Indian Reservation Roads without approval of the Secretary of the Interior?

Correct. According to 23 U.S.C.A. §204 (l) 2 (a) & (b), a Tribe does not have to get approval from the Secretary of the Interior for contracts negotiated between a Tribe and a State for maintenance of roads connecting to Indian Reservation Roads and to the IRR’s themselves. This is a great opportunity for Tribal economic development because Tribes can often maintain these roads at a cheaper cost than the State can due to the rural and remote location of many of these roads.

¹⁰ 23 U.S.C.A. §204 (c)

¹¹ 23 U.S.C.A. §204 (c) (1998), *amended by* 23 U.S.C.A. §204(c) (2005)

¹² *Id.*

¹³ 23 U.S.C.A. §204 (l) 1 (a)

¹⁴ 23 U.S.C.A. §204 (l) 1 (b)

¹⁵ 23 U.S.C.A. §204 (l) 2 (a)

¹⁶ 23 U.S.C.A. §204 (l) 2 (b)

Who gets the money to implement the Tribal Transportation programs?

Money granted for Tribal transportation comes from two main sources: the U.S. Department of Transportation Federal Highway Administration (FHWA) and the Bureau of Indian Affairs (BIA). It is important to note that FHWA allocated funds for maintenance of reservation roads is in addition to and not to replace any obligation of funds by the BIA for road maintenance programs on the Indian reservation.¹⁷

The BIA and FHWA jointly administer the program for Indian Reservation Roads (IRR) through an interagency agreement.¹⁸ The BIA and the Tribal governments undertake most of the design and construction of IRR projects. Under Tribal-State maintenance agreements, the Tribe would receive payment from the State because, under these agreements, the *Tribe is assuming the responsibility of the State for road maintenance projects*. “Assumes” in this context means that the Tribe is contracting the responsibility of these road maintenance projects away from the State and the State pays the Tribe for this service.

How does a Tribal Government get the funds for Indian Reservation Roads Transportation Planning?

At the beginning of each fiscal year, the Bureau of Indian Affairs Department of Transportation (BIADOT) issues contract authority to BIA area-offices. Within 10 days of receipt of the contract authority, the area office notifies all area Indian Tribal Governments of available funding.¹⁹ The Fiscal Year for the federal government begins on October 1st and ends on September 30 of the next calendar year. For example, the fiscal year 2007 began on October 1, 2006 and ends on September 30, 2007.²⁰ Accordingly, **Tribal governments will want to look for notice of available funding for Tribal Transportation planning in October.** Once available the Tribes can obtain the funds through three methods: (1) self-governance compacts; (2) contracts through the Indian Self-Determination and Education Assistance Act; and (3) Direct Service Tribes.

(1) What is a Self-Governance Compact and how does a Tribe operating under one get IRR funding?

In 1987 the Indian Self-Determination Act was amended to make contracting with tribes easier by strengthening the direct Federal Government to Tribal Government relationship through self-governance compacts.²¹ Tribes with Self-Governing compacts receive a lump sum budget no less than the amount they would receive if all of the funding for the various tribal programs were added up individually.²² The lump-sum of money is called

¹⁷ 23 U.S.C.A. §204 (c)

¹⁸ www.fhwa.dot.gov/flh/indresrd.htm

¹⁹ <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

²⁰ <http://www.rules.house.gov/archives/98-325.pdf>

²¹ Getches, David H., et al., *Cases and Materials on Federal Indian Law* 222 (5th ed. 2005)

²² Indian Self-Determination Amendments of 1987 (PL 100-472) § 303 (a)(6) (West, Westlaw 2007)

an Annual Funding Agreement (AFA), which is a similar to a budget of how the tribe wants to allocate money towards programs.

For IRR planning, a Self-Governing Tribe will want to include the IRR planning on their AFA. According to the Federal Department of Transportation website, “The criteria within the AFA must include a transportation planning line item, estimated funding, and a negotiated portion of or at minimum the following services to be provided: *“Conduct transportation planning activities and/or develop a tribal TIP and select projects for proposed funding.”* (emphasis added). Self-Governance tribes intending to include transportation planning in their compact, should notify the Secretary of the Interior of intent to negotiate an amendment to the AFA. (emphasis added).²³

Upon execution of the AFA and the Secretary of Interior's receipt of funding, the Indian Tribal Government is authorized to carry out transportation planning activities utilizing IRR transportation planning funds. The Secretary of the Interior shall directly transfer to the compacted tribe its share of IRR transportation planning funds within 10 days of receipt.²⁴

(2) What is a *contract through the Indian Self-Determination and Education Assistance Act (P.L.- 93-638)* and how does a Tribe operating under one get funding?

A Tribe with a P.L. 93-638 Contract (a transportation contract), will write a contract to be approved by the Secretary of the Department of the Interior. The Department of the Interior will allocate all funds authorized for to be appropriated for IRR to the Tribes requesting money.²⁵ The Secretary of the Interior will decide what projects will be funded through a formula based on factors that reflect the relative needs of the Tribes and reservations for transportation assistance²⁶; and things that affect how much it will cost to administer the projects (ie remote locations of Tribes, how much it costs to maintain the roads, etc.).²⁷

According to the Federal Department of Transportation website the contract must include a funding amount, and at minimum the following services, or a portion thereof, to be provided: *“Conduct transportation planning activities and/or develop a tribal TIP and select projects for proposed funding.”*²⁸

The difference between Tribes operating under a Self-Governance Compact and a P.L. 93-638 Contract is that the money for Tribal Transportation planning is included as a line-item in a budget that contains all the money that a Tribe is requesting to operate their government and programs; while a P.L. 93-638 Contract contains the budgeted amount for a Tribe to operate the Tribal Transportation program only.

²³ <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

²⁴ *Id.*

²⁵ 23 U.S.C. 202 (d)(2)(A)

²⁶ 23 U.S.C. 202 (d)(2)(D)(i)

²⁷ 23 U.S.C. 202 (d)(2)(D)(ii)

²⁸ <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

(3) What is a Direct Service Tribe and how do they participate in Tribal Transportation planning?

A Self-Governance Compact is a Tribal budget that contains mini-budgets for all the different programs, operational, and administrative costs associated with governing a Nation. A P.L. 93-638 contract is an individual mini-budget covering the specific costs associated with conducting a program like Indian Health Service, historic preservation, or paying for Tribal Court judges. In both of these situations, the Tribe receives a transfer of money to conduct their Tribal Transportation programs. These contracts may contain provisions for planning and for overseeing design, construction, or other aspects of the transportation project.

In contrast, a Direct Service Tribes (Tribes without any transportation contracts or compacts with the BIA), can participate in Tribal Transportation planning by alerting sending a written request 2-weeks in advance to the Area/Agency road engineer. The Area Roads engineer serving Wisconsin, Iowa, Minnesota, and Michigan is:

**Tony Kirby, Area Roads Engineer,
Bureau of Indian Affairs
1 Federal Drive, Room 550
Fort Snelling, MN 55111**

A Direct-Service Tribe would want to send a representative to a Tribal Transportation planning meeting to ensure that Tribal Transportation needs are considered in future construction plans. More importantly, a Tribe has a right to be included in such meetings under 23 U.S.C. § 134 (Metropolitan Transportation Planning)²⁹ and 23 U.S.C. § 135 (Statewide Transportation Planning).³⁰ Moreover, participating in Tribal Transportation planning meeting are a first step for Tribes to educate themselves with the process. Knowledge is key for Tribes to be able to advance their self-reliance through self-governance and contracting.

²⁹ Metropolitan Transportation Planning, 23 U.S.C. § 134 (i)(2)(B)(ii) (West, Westlaw 2007)

³⁰ Statewide Transportation Planning, 23 U.S.C. § 135 (f)(2)(C) (West, Westlaw 2007)

To attend a Transportation Planning meeting, a Tribal representative would want to fill out the below form available at <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

**TRAVEL AUTHORIZATION REQUEST
TO ATTEND
TRANSPORTATION PLANNING MEETING, CONFERENCE, OR SEMINAR³¹**

Information on Traveler

Name: _____ Social Security No. _____
Title: _____ Day-time Phone No. _____
Home Mailing Address: _____
City: _____ State: _____ Zip Code: _____
Tribe being represented: _____

Meeting/Conference Information

Name: _____ Dates: _____
Meeting Location: _____ City: _____ State: _____
Registration Fee (if applicable): _____
(Please attach copy of meeting notice and agenda)

Travel Information

Departure Date: _____ Return Date: _____
Modes of Travel: Privately Owned Vehicle (POV) Commercial Airliner Both
Car Rental Daily Rate (if applicable): Size: (circle one) Compact Economy Mid-Size
Estimated round-trip vehicular mileage to airport _____ or meeting location _____
Departure Airport City: _____ Destination Airport City: _____
Estimated cost of round-trip airfare (economy class): _____
(Note: Traveler is responsible for making Airline Reservations and Purchasing Ticket)

Authorized By: _____ Date: _____
(Tribal Leader's Signature)

³¹ <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

What happens after filling out a Tribal Transportation Travel Authorization Request?

Upon approval of the request, authorization will be sent by the Area Roads Engineer office to the designated traveler. The traveler is responsible for making airline reservations and purchasing tickets for air travel. Government rates are to be requested when making airline reservations. The reimbursement of airfare will be for economy class only.³²

The traveler will be reimbursed for registration fees (if applicable) and all allowable travel expenses associated with attending the meeting, conference, or seminar. Reimbursement of travel and lodging costs will be in accordance with the current Government per diem rate for the locale in which the meeting, conference, or seminar is held.³³

For more information, please visit

<http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

³² <http://www.fhwa.dot.gov/flh/reports/indian/chapter2.htm>

³³ *Id.*