



## UNITED SOUTH AND EASTERN TRIBES, INC.

---

USET Resolution No. 2003:029

### AUTHORIZING SUBMISSION OF COMMENTS TO THE U.S. DEPARTMENT OF TRANSPORTATION REGARDING INDIAN RESERVATION ROADS (IRR) REGULATIONS IMPLEMENTING THE TRANSPORTATION EQUITY ACT FOR THE 21<sup>ST</sup> CENTURY (TEA-21)

- WHEREAS,** United South and Eastern Tribes Incorporated (USET) is an Intertribal organization comprised of twenty-four (24) federally recognized tribes; and
- WHEREAS,** the actions taken by the USET Board of Directors officially represent the intentions of each member tribe, as the Board of Directors comprises delegates from the member tribes' leadership; and
- WHEREAS,** improving and developing transportation systems which serve the tribes is critical to the future well being of our members; and
- WHEREAS,** maximizing tribal flexibility and discretion in the administration of the IRR Program; honoring tribal sovereignty and furthering the policy of self-determination and self-governance; increasing Federal accountability and responsiveness to the Indian governments they serve; eliminating unnecessary bureaucratic requirements which burden the operation of the IRR Program; promoting sensible economic practices and innovative thinking; and improving communication, consultation and collaboration in performance of the IRR Program, are tribal goals which will ensure that tribal transportation priorities are addressed and the health and safety of our members are protected; and
- WHEREAS,** the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), P.L. 105-178, 112 Stat. 107, signed into law in 1998 expands the use of and appropriates Federal Highway Trust funds through fiscal year 2003, including funds for the Indian Reservation Roads (IRR) Program; and
- WHEREAS,** Section 1115(b) of TEA-21 mandates that the Federal government enter into negotiated rulemaking with tribal governments to develop IRR Program regulations as well as an equitable funding formula to allocate IRR funds; and
- WHEREAS,** a TEA-21 Negotiated Rulemaking Committee comprised of representatives of small, medium and large Indian tribes convened and negotiated a proposed regulation for the IRR Program with Federal representatives of the U.S. Department of the Interior and U.S. Department of Transportation which was published in draft on August 7, 2002, by the BIA for comment; and
- WHEREAS,** the Federal and Tribal Caucuses of the Negotiated Rulemaking Committee could not reach agreement on a number of important issues relating to the IRR Program, and requires the comments of Affected Indian tribes to better inform the Committee; therefore, be it
- RESOLVED** that the USET Board of Directors hereby authorizes the submission of the attached public comments to the proposed IRR rule and endorses the views of the Tribal Caucus regarding non-consensus issues; and, be it further
- RESOLVED** that the USET Board of Directors urges the Department of the Interior and Department of Transportation to promptly reconvene the TEA-21 Committee to finalize the IRR regulations, including the non-consensus issues, and develop and promptly publish an FY 2003 interim funding formula to distribute IRR funds, consistent with the government-to-government relationship existing between the United States and sovereign Indian nations

*“Because there is strength in Unity”*

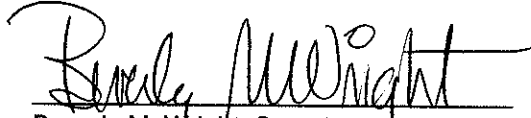
USET Resolution No. 2003:029

**CERTIFICATION**

This resolution was duly passed at the USET Annual Board Meeting and EXPO, at which a quorum was present in Uncasville, CT, Thursday, October 31, 2002.



Keller George, President  
United South and Eastern Tribes, Inc.



Beverly M. Wright, Secretary  
United South and Eastern Tribes, Inc.

Attachment

USET Resolution No 2003:029

**AUTHORIZING SUBMISSION OF COMMENTS TO THE U.S. DEPARTMENT OF TRANSPORTATION  
REGARDING INDIAN RESERVATION ROADS (IRR) REGULATIONS IMPLEMENTING THE  
TRANSPORTATION EQUITY ACT FOR THE 21<sup>ST</sup> CENTURY (TEA-21)**

**25 C.F.R. Part 170**

**Indian Reservation Roads Program**

Proposed Rule: Docket No. FHWA2002-12229

RIN 1076-AE17; Indian Reservation Roads

**United South and Eastern Tribes Incorporated (USET) Comments**

**October 31, 2002**

The comments below are divided into three parts. Part I provides USET's general comments regarding the NPRM and the Negotiated Rulemaking process performed by the TEA-21 Negotiated Rulemaking Committee ("the Committee"). Part II sets out USET's recommended changes to the substantive proposed regulations and allocation formula (to so-called "Tribal Transportation Allocation Methodology" or "TTAM") that, when finalized, will replace the BIA's current regulations at 25 C.F.R. Part 170. Part III sets out our proposed resolution of the issues the TEA-21 Negotiated Rulemaking Committee Federal and Tribal Caucuses could not reach agreement on or which the Administration believes to be outside the scope of the rulemaking.

In short, USET fully support the Tribal Caucus position on the non-consensus issues. USET finds the Tribal Caucus's position to be reasonable and in keeping with the Federal Government's general policy to support Indian self-determination and self-governance.

**I. General Comments on the NPRM**

**A. The BIA and DOT must accept key principles in finalizing the TEA-21 IRR regulations.**

USET fully supports and endorses the Tribal Caucus view that regulations for the IRR Program must be developed and guided by certain key principles. These principles are:

- maximize flexibility and discretion of Indian tribal governments to allow tribes the ability to resolve their transportation problems;
- honor and respect tribal sovereignty and further the federal policy of tribal self-

- determination and self-governance;
- increase accountability and responsiveness of the BIA and FHWA to the Indian tribal governments;
- promote sensible economic practices and facilitate sensible and innovative financing mechanisms to build and maintain the IRR system;
- improve communication, consultation and collaboration among tribal, federal, state and local transportation agencies;
- streamline, simplify and make more uniform BIA and FHWA management of the IRR Program to ensure consistent treatment of all Indian tribes regardless of location or region;
- eliminate unnecessary bureaucratic requirements that complicate the IRR Program or create unnecessary redundancies;
- build on and promote positive examples of successful transportation projects, programs, ideas and strategies so that these “best practices” may be implemented, modified and adapted throughout the IRR system.

USET urges the Committee and the Secretaries of Interior and Transportation to accept these principles and be guided by them when finalizing the proposed regulations, and more importantly, to use them as benchmarks during the internal agency clearance process once the Committee completes its work. It rings hollow for the Administration to make statements of support for tribal self-determination in the “Secretarial Policy” provision of the regulations, yet fail to implement the policy through concrete application in the substantive program regulations.

If these principles, as well as the government-to-government relationship are to be honored, then all appropriate Interior and DOT officials must also receive adequate and timely training regarding the final regulations so that they too may benefit from and assist their Regions and the tribes located in their Regions to improve transportation programs and projects throughout Indian country. Federal officials must also be more forthcoming in providing timely responses to data requests made by the Tribal Caucus when the Committee reconvenes to review these comments.

## **B. General Observations**

As a general observation, it is evident that the Administration has made many substantive, unilateral changes to the consensus regulations developed by the Committee since December 2000, when it adjourned after completing its work on the IRR Program regulations. If, as noted by the BIA in the preamble to the NPRM, “TEA-21, Section 1115(b) *mandates* that the Federal Government ... enter into negotiated rulemaking with tribal governments *to develop IRR Program procedures and a funding formula to allocate IRR funds*” (67 Fed. Reg. 51330), it

should follow that the Administration must honor Congress' intent that the draft regulation reflect the *consensus* regulation negotiated by the Committee rather than unilateral agency decision making.

Too often, important concessions made during the negotiated rulemaking process by both tribal and Federal officials have been undone by Department officials not as informed on the nuances of an issue and who fail to appreciate the consensus position. In negotiated rulemaking, both sides benefit from participating in an open dialogue which explores every aspect of an issue and the consensus proposal developed reflects the appropriate balance between competing interests.

This is one of the many purposes of negotiated rulemaking — to inform agency decision making during the rulemaking process and to make final regulations less likely to be challenged by those whom it regulates. It is unfortunate that Federal officials in the agency clearance process failed to support the negotiated consensus position negotiated during the rulemaking.

USET requests that the Administration's unilateral changes to the NPRM be treated by the TEA-21 Committee as "public comments" to be reviewed by the Committee against the Committee's consensus regulations appearing in Documents 1-15. The entire proposed regulations should also be reviewed by the Committee for internal consistency, including where no public comment specifically addresses a proposed regulation provision, to ensure that the final rule does not contain provisions which may be in conflict with one another. The Committee should also carefully review the proposed definitions of subpart A which were not reviewed by the full Committee and do not constitute "consensus" definitions. As public comments, the Administration's unilateral changes should be reviewed by the Committee and either accepted, rejected or modified consistent with TEA-21 and other relevant laws and regulations.

As addressed more fully in Part III, USET finds the Administration's view, that the non-consensus issues of advance funding, savings contractibility, and availability of contract support funding for the IRR Program are "outside the scope of this rulemaking," to be unsupportable and contrary to provisions of TEA-21, the Indian Self-Determination and Education Assistance Act, and the conduct of the Federal officials to the Committee who vigorously debated the content of these proposed regulations for the 18 month period that the Committee was formally convened. It is inconceivable that the Federal Caucus to the Committee, comprised of officials of the Department of the Interior, the Department of Transportation, and their respective solicitors, intimately familiar with the Indian Self-Determination Act and TEA-21, only belatedly discovered that issues that comprise entire subparts of the NPRM (e.g., contractibility of IRR Programs) were in fact "outside the scope of the rulemaking." This position is unsupportable in law and a disservice to the many tribal and Federal Committee members who negotiated these issues for many months in good faith.

The tribes and Federal caucuses disagreed on these important issues. The full Committee should attempt to reconcile the differences and provide meaningful regulatory guidance to both Federal and tribal officials who must implement the IRR Program. The Administration position that contractibility and other issues are “outside the scope of the rulemaking” is nothing short of an abdication of its statutory obligations to develop comprehensive IRR Program regulations through the negotiated rulemaking process as mandated by Congress. USET respectfully requests that the Federal members of the Committee be given full authority to negotiate these issues when the Committee reconvenes to review the public comments.

It is USET’s hope that through face-to-face discussions with BIA and DOT officials in rulemaking sessions to finalize the IRR Program regulations, the Administration will reconsider its viewpoint on these subjects.

## **II. Recommended Changes to NPRM Provisions of 25 C.F.R. Part 170**

To facilitate the reader’s use of these comments, the August 7 NPRM headings, section citations and page numbers (67 Fed. Reg. 51328 et seq., hereafter denoted by its Federal Register page number only) are used to organize the comments set out below.

### **Subpart A - General Provisions and Definitions**

#### **Page 51359**

**170.3(d) What is the Federal Government’s IRR policy? Comment:** Revise paragraph (d) by striking the term “should” and inserting in lieu thereof the term “shall” so that the paragraph reads: “The Secretary *shall* interpret Federal laws and regulations in a manner that facilitates including programs covered by this part in the government-to-government agreements authorized under the IDSEAA.” Discretionary wording of NPRM 170.3(d) carries little weight and is not consistent with final sentences of paragraph (e)(2).

**170.3(e)(2) Liberal Interpretation of Regulations. Comment:** Move the second and third sentences of paragraph (e)(2) which begin “This part must be liberally construed for the benefit of Indian tribes ...” to a new paragraph (f). It is not appropriate to place it after the first sentence of paragraph (e)(2) which concerns a separate matter on the reduction of funding.

**170.4 Do other requirements apply to the IRR Program? Comment:** Revise the NPRM

provision to read as follows: "Only those IRR Program policy and guidance manuals and directives which are consistent with the regulations in this part and 25 C.F.R. Parts 900 and 1000 apply to the IRR Program when administered by the BIA. An Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, otherwise required by law." See, 25 C.F.R. 900.5.

**170.6 Definitions. Comment:** The NPRM definitions were not and are not consensus definitions. As such, the NPRM definitions should be carefully reviewed by the Committee when the NPRM is finalized.

#### **Page 51360**

**"IRR transportation planning funds." Comment:** strike the parenthetical reading "(up to 2%)" from the definition as the reauthorization of TEA-21 may specify a different percentage or method to calculate transportation planning funds for tribes.

**"program." Comment:** strike the Federal Government's proposed definition of "program" and substitute the Tribal Caucus definition of this term: "Program means any program, service, function, or activity, or portion thereof." This definition is consistent with the BIA's definition of "program" under Title IV of the P.L. 93-638. See, 25 C.F.R. 1000.2. The Departments should support uniform treatment of terms in both the existing Title I, IV and Title V regulations implementing P.L. 93-638. The IRR Program is one aspect of contractible and compactible programs operated by the BIA for the benefit of Indians. Further discussion of the non-consensus issues are found in Part III herein.

**Additional Definitions. Comment:** Subpart C of the NPRM, which sets out the consensus allocation formula for the IRR Program, contains a number of new terms which may require definition to facilitate Federal and tribal use of the IRR Program regulations. The Committee should give some thought to developing definitions for such terms as "Tribal Transportation Allocation Methodology," "High Priority Projects," "Population Adjustment Factor," *other* terms used in Subpart C, as well as other terms used, but not defined, in the NPRM (e.g., "National IRR Inventory Database" (referenced in 170.295)).

#### **Page 51361**

### **Subpart B - IRR Program Policy and Eligibility**

#### **Consultation, Collaboration, Coordination**

**170.105(b) Provision of technical assistance. Comment:** This section should cross-reference the provisions of Title I and Title V regulations of P.L. 93-638 which require the Interior Department to provide technical assistance to a tribe interested in assuming a program, function, service or activity pursuant to P.L. 93-638 (e.g., 25 C.F.R. 900.7; 25 C.F.R. 900.120; 25 C.F.R. 900.122(b)(1); 25 C.F.R. Subparts C and D).

**Page 51362**

**Eligibility for IRR Funding**

**170.114 What activities may be funded with IRR funds? Comment:** Add the phrase “subsequent or prior unpublished” in the introduction to this section so the proviso reads: “Notwithstanding any **subsequent or prior unpublished** guidance, IRR funds may be used: ... .” If the Interior Department were to issue a “guidance,” *subsequent* to the promulgation of final regulations altering eligible activities which may be financed with IRR funds, such guidance could violate the requirements of 25 C.F.R. 900.5 which provides:

Except as specifically provided in the [Indian Self-Determination] Act, or as specified in subpart J [construction], an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary [of Interior], unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law.

The development of IRR program policies and procedures by the IRR Program Coordinating Committee under section 170.173(a)(2), must be harmonized with the requirements of 25 C.F.R. 900.126 which permits an Indian tribe or tribal organization to develop *tribal* construction procedures, standards and methods so long as such standards are “consistent with or exceed applicable Federal standards.” In such instances, the Tribal standards “shall” be accepted by the Secretary of the Interior. *Id.* The NPRM should reflect this. *See, e.g.,* NPRM, 170.464; 170.472; and 170.514 (51387, 51390) (tribes may propose road and bridge design and construction standards and management systems which are consistent with or exceed applicable Federal standards).

**170.115 What activities are not eligible for IRR Program funding? Comment:** While tribes may agree with the NPRM provision that IRR funds should not be used to develop trails as provided in 23 U.S.C. 206(g), the TEA-21 prohibition applies to states and not Indian tribes which are not included in TEA-21's definition of “state.”



USET recommends that a provision be added to the NPRM which states that: "Unless expressly referenced in the IRR Program regulations, TEA-21 provisions, otherwise applicable to states, do not apply to Indian tribes assuming IRR programs, functions, services and activities under P.L. 93-638."

**The proposed text states that cyclical maintenance activities are not eligible uses for IRR program funds. USET believes tribes should be given greater flexibility to allocate IRR program funds for certain maintenance activities in order to protect their investment in existing roads and to make more efficient use of roads construction dollars.**

**170.116 How can a tribe determine whether a new proposed use of IRR funds is allowable? Comment:** USET objects to the requirement that a tribe that proposes a new use of IRR program funds must submit a request to both the BIA and FHWA. USET supports the Tribal Caucus's rationale and proposed regulatory text found on page 51336 of the NPRM and recommend that the Administration's proposed text be deleted.

The Administration's proposal in 170.116 is contrary to other Administration efforts to streamline Federal regulations and permit non-Federal entities to administer programs from multiple agencies without numerous and often contradictory regulatory requirements. See, e.g., OMB implementation of the Federal Financial Assistance Management Improvement Act of 1999, 67 Fed. Reg. 52544 (Aug. 12, 2002) and our further discussion of this non-consensus issue in Part III herein.

#### **Page 51363**

##### **Use of IRR and Cultural Access Roads**

##### **Seasonal Transportation Routes**

**170.137 Are there standards for seasonal transportation routes? Comment:** The answer to the question "Are there standards for seasonal transportation routes" is incomplete and unclear in its present form. It is possible that text has been omitted from this provision. No citation is provided for relevant Federal standards for seasonal transportation routes. The answer is simply "yes" followed by "in addition, a tribe can develop" standards which meet or exceed state, Federal or national standards. If tribal standards are "in addition" to something, some effort should be made to discuss what seasonal transportation route standards are and where they can be found. Tribes should have the opportunity to examine and question whether the other standards actually apply to the IRR Program.

**IRR Housing Access Roads and Toll Roads**

**170.143 How are IRR housing access roads and housing street projects funded? Comment:**  
Revise the last sentence of NPRM 170.143 to read:

**“ ... IRR funds are available to construct IRR housing access roads and housing street projects after the projects are on the FHWA-approved IRR TIP. Tribes may expend IRR funds on pre-project planning activities, identified in 170.409 before project approval on the IRR TIP”**

The intent of the revision is to reflect the fact that costs associated with *pre-construction* activities, which lead up to the addition of IRR housing access roads and housing street projects to the Tribal TIP, are an allowable expenditure of IRR funds before such projects are included in the IRR TIP.

**Page 51364**

**Recreation, Tourism, Trails**

**170.150 Are Federal funds available for a tribe’s recreation, tourism, and trails programs? Comment:** Add a new paragraph (h) “Such other funding as Congress may authorize and appropriate.”

**Highway Safety Functions**

**170.155 What Federal funds are available for tribe’s highway safety activities? Comment:** Add a new paragraph (f) “Such other funding as Congress may authorize and appropriate.”

**Page 51365**

**170.156 How can tribes obtain funds to perform highway safety projects? Comment:** USET recommends the addition of a new paragraph (c) “Congress may authorize other methods by which tribes may obtain funds for highway safety projects.”

**Transit Facilities**

**Page 51366**

**IRR Program Coordinating Committee**

**170.173(a)(2) What are the responsibilities of the IRR Program Coordinating Committee?**

**Comment:** See above comment regarding 170.114 (page 51362) regarding tribal exemption from unpublished agency guidelines and manuals. USET recommends that any IRR Program policies and procedures developed by the IRR Program Coordinating Committee and approved by the BIA and/or FHWA, which are not issued as regulations under the Administrative Procedure Act (APA), constitute “guidance” to Indian tribes and tribal organizations which contract or compact IRR programs, functions, services and activities under P.L. 93-638. See, e.g., 25 C.F.R. 900.6 and 25 C.F.R. 900.126. The final IRR rule should clarify the applicability to P.L. 93-638 tribes of IRR Program Coordinating Committee “policies” (applicable only if agreed to by the tribe and the Secretary in a P.L. 93-638 contract or agreement).

**Indian Local Technical Assistance Program (LTAP)**

**LTAP-Sponsored Education Training Opportunities**

**Page 51368**

**Appendix A to Subpart B - Allowable Uses of IRR Program Funds**

**Planning and Design Activities. Comment:** Appendix A should expressly authorize travel and lodging costs incurred by tribes for employee training or continuing education in transportation planning, or for Tribal participation in the IRR Program Coordinating Committee (in the event Federal funding is limited for member or alternate member travel). References are made for such “on the job education” (App. A.A.33) (51368, col.3), LTAPs (App.A.A.19) (51368, col. 2) and “public meetings and public involvement activities”(App. A.A.25) (51368, col. 2), but not the travel and lodging expense associated with attending such events. BIA regions should not require tribes to obtain approval by the FHWA or the yet-to-be-created IRR Program Coordinating Committee before such activities are approved.

**Page 51370**

**Subpart C - IRR Program Funding**

**Tribal Transportation Allocation Methodology for IRR Construction**

**170.225 How are IRR Program funds allocated? Comment:** USET recommends that in the final rule the percentage figure of “2%” be stricken and the TEA-21 statutory reference (23 U.S.C. 204(j)) be used in lieu of the 2% figure for the Transportation Planning Program amount. Legislation, such as S.2971 introduced this session by Senator Bingaman, proposes 4% for

Transportation Planning Program. The *final* rule should not reference a particular percent as that figure may change in TEA-21's reauthorization. The same comment would apply to the "2% Planning" box in the diagram following 170.226. Substitute, for example, "the statutory amount provided in 23 U.S.C. 204(j)."

**170.232 How does BIADOT allocate and distribute 2% Transportation Planning funds?**  
**Comment:** See comments to 170.225 regarding the reference to "2%" in this subpart.

**Page 51371**

**170.236 Does the Relative Need Distribution Factor allocate funding among the individual tribes, or only to the Regions?** **Comment:** Cross reference NPRM 170.409 (51382) which acknowledges the ability of tribes to expend IRR funds for pre-project planning activities "before project approval on the IRR TIP." Add the following sentence to the end of NPRM 170.236:

"IRR funds may, however, be expended by the tribe on pre-project planning activities before project approval on the IRR TIP as provided in 170.409."

**IRR High Priority Project (IRRHPP) Program**

**170.245 and 170.248 What is the IRR High Priority Project (IRRHPP) Program? and How will BIA and FHWA rank and fund IRRHPP project applications?** **Comment:** USET recommends that the Committee consider adding additional provisions to ensure that BIADOT and FHWA do not favor one class of tribes (e.g., direct service over contracting/compacting tribes) in the award of IRRHPP Program funds, since these agencies, using the Project Scoring Matrix of Appendix A to Subpart C, rank all applications. Although the matrix sets out objective criteria, the ranking itself is subjective. In some instances, BIA may have greater familiarity with a direct service tribe's HPP than a contracting/compacting tribe's and such knowledge may skew the scoring and ranking of IRRHPP applications.

**Page 51373**

**Relative Need Distribution Factor**

**170.282 What is the Population component of the Relative Need Distribution Factor and how is it determined?** **Comment:** USET recommends that the statutory citation to NAHASDA (25 U.S.C. 4101 et seq.) be added following the reference to that Act.

### **IRR Inventory and Long Range Transportation Planning (LRTP)**

#### **170.290 How is the IRR Inventory used in the Relative Need Distribution Factor?**

**Comment:** Correct the citation to the NPRM provision which defines “IRR Inventory” from 170.445 to 170.446.

#### **Page 51374**

**170.296 How is the IRR Inventory kept accurate and current?** **Comment:** Paragraph (g) states that BIADOT will approve all submissions from the BIA Regional Offices for inclusion into the National IRR Inventory. Many tribes experience great difficulty in getting IRR eligible projects added to their TIP and eventually reflected in the National IRR Inventory. USET recommends that the Committee consider additional regulations which permit a tribe to challenge either the Region’s or BIADOT’s decision to exclude what a tribe believes to be an eligible project from the IRR Inventory.

**170.297 Is transportation planning included in the IRR Inventory and IRR Transportation Improvement Program (TIP)?** **Comment:** This section should be revised to clarify that while “only project specific transportation activities are included in the Inventory and TIP,” section 170.406 provides that tribes “*may* identify transportation planning as a priority in their tribal priority list or TTIP.”

#### **Page 51381**

### **Subpart D - Planning, Design, and Construction of IRR Program Facilities**

#### **Transportation Planning**

**170.401 What transportation planning functions and activities must BIA perform for the IRR Program?** **Comment:** USET recommends that this provision and 170.402 be clarified as to the duties the BIA must perform as an Inherently Federal Function, versus those IRR duties and functions it must perform by law but which an Indian tribe or tribal organization may contract/compact for under P.L. 93 638. The current text may confuse tribes and BIA Regional staff who may believe that the activities listed in 170.401(b), and (d) through (j) are non contractible/non compactible functions which only the BIA can perform. This is not the case. USET supports the Tribal Caucus resolution of this issue.

**170.402 What transportation planning functions and activities must tribes perform under**

**a self-determination contract or self-governance agreement? Comment:** For the reasons stated in 170.401, USET believes that this section should be revised to reflect the fact that tribes and tribal organizations may assume all BIA duties performed under the IRR Program, pursuant to P.L. 93 638, with the exception of paragraphs (a) of NPRM section 170.401. Section 170.402 should include the following text before the first sentence of the NPRM reading: "Tribes must prepare a Tribal TIP (TTIP). ... .":

**"Except for functions and activities listed in 170.401, Tribes and tribal organizations assuming IRR transportation planning functions and activities under the ISDEAA may perform all transportation planning functions and activities otherwise performed by the BIA in its direct operation of the IRR Program, including among other activities:"**

**170.403 Who performs transportation planning for the IRR Program? Comment:** This NPRM section should follow 170.400 as 170.401. It correctly introduces the next two sections on planning activities and functions performed either by the BIA or by tribes under P.L. 93 638.

**170.404 What IRR funds can be used for transportation planning? Comment:** As noted above, USET recommends that the final regulations not state the percentage (currently 2%) of IRR funds that are reserved for transportation planning. The reauthorization of TEA 21 may establish a new percentage for transportation planning. The first sentence of 170.404 can be revised to read:

**"A percentage of the IRR funds are reserved for transportation planning for tribal governments as provided for under section 204(j) of Title 23."**

**170.405 How must tribes use planning funds? Comment:** Strike the phrase "2 percent" in the first sentence of this section so that it reads: "IRR transportation planning funds are only available for tribal governments. . . ."

#### **Page 51382**

**170.406 Can IRR Construction funds be used for transportation planning activities? Comment:** See above comments to NPRM 170.297 (51374).

**170.407 Can IRR 2 percent planning funds be used for road construction and other projects? Comment:** As noted above the NPRM heading should be revised to strike the specific reference to "2 percent." Substitute the phrase "transportation" and "transportation

planning” into the heading and answer portion, respectively.

**170.408 What happens to 2 percent planning funds unobligated after August 15?**

**Comment:.** Strike “2 percent” in both the heading and answer portion of this provision.

**170.409 What is pre-project planning? Comment:** Cross reference this NPRM provision in 170.143 (page 51363) to clarify that while no IRR funds may be expended for construction on projects not yet included on a tribe’s TIP, IRR funds may be expended on pre-project planning activities as listed in 170.409.

**Page 51383**

**170.417(e) How are projects placed on the TTIP and IRR TIP? Comment:** USET recommends that paragraph (e) of NPRM 170.417 be revised to reference the fact that tribes that do not generate sufficient annual funding under the IRR funding formula, in addition to seeking flexible financing, as noted in 170.417(e) of this provision, may also apply to the BIA for IRRHPP Program funds, as provided in Subpart C of the NPRM to finance a tribal priority project.

The last two sentences of NPRM 170.417(e) can be revised to read:

“Alternatively, such tribes may either enter a consortium of tribes and delegate authority to the consortium to develop the TTIP and tribal control schedule, may enter into agreement with other tribes to permit completion of the project, **or may apply for IRRHPP Program funding under subpart C. In addition**, in order to get a project on the **IRR TIP**, tribes may **also** seek flexible financing alternatives available as described in subpart C of this part.”

**170.420 How is the IRR TIP updated? Comment:** No consensus reached by the USET with respect to a unified comment, however each Tribe may submit a comment for Subpart D Section 170.420.

**170.422 When may the Secretary amend the IRR TIP? Comment:** See comments above regarding 170.420.

**Page 51384**

**170.430 How does BIA or a tribe involve the public in developing the IRR long range Transportation plan? Comment:** Revise this section as follows:

NPRM Proposed Text (Aug. 7, 2002)	Recommended Rewrite
<p>BIA or the tribe must solicit public involvement. Tribes may do so in accordance with their own tribal laws and policies. If there are no tribal policies, tribes must use the procedures in this section. Public involvement begins at the same time long range transportation planning begins and covers the range of users, from private citizens to major public and private entities. Public involvement may be handled in either of the following two ways:</p> <p>(a) <i>Public Meetings</i>: BIA or the tribe must:</p> <p>(1) (4) [no change]</p> <p>(b) <i>Public Notice</i>: BIA or the tribe must:</p> <p>(1) (2) [no change]</p>	<p>(a) BIA or the tribe must solicit public involvement. Tribes may do so in accordance with their own tribal laws and policies.</p> <p>(b) If there are no tribal policies, tribes must use the procedures in <b>paragraphs (c) and (d)</b> of this section. Public involvement begins at the same time long range transportation planning begins and covers the range of users, from private citizens to major public and private entities. Public involvement may be handled in either of the following two ways:</p> <p>(c) <i>Public Meetings</i>: BIA or the tribe must:</p> <p>(1) (4) [no change]</p> <p>(d) <i>Public Notice</i>: BIA or the tribe must:</p> <p>(1) (2) [no change]</p>

The above formatting changes make clear that if a tribe has its own law or policy on involving the public in developing long range transportation plans, the procedures for public meetings and public notices set out in 170.430 do not apply.

**170.433 When does BIA update the IRR TIP?** **Comment:** USET recommends that this provision be merged with 170.420 (page 51383).

**170.434 When may the Secretary amend the IRR TIP?** **Comment:** USET recommends that this provision be merged with 170.422 (page 51383).

**170.435 How does BIA or a tribe solicit public participation during the development of the IRR TIP?** **Comment:** Delete this provision which repeats 170.425 (page 51383).

#### **Page 51385**

**170.436 What happens after the IRR TIP is approved?** **Comment:** Delete this provision which repeats 170.426 (51383 384).

#### **Public Hearings**



As a general observation, there are a number of provisions which precede the section on "Public Hearings" devoted to involving the public in development of the IRR long range transportation plan and IRR TIP (170.430 and 170.435)(page 51384). USET recommends that these provisions be integrated with the provisions under the heading of "Public Hearings" on page 51385 and the entire section perhaps reorganized to place the public hearing sections before the provisions on how tribes use the long range transportation plan and how the BIA updates the IRR TIP (170.432 and 170.433). Additional changes may be required in the final rule to clarify when tribal laws and policies on public consultation (see 170.430) supersede the procedures set out in the Public Hearings portion of this subpart (170.437 170.445).

**170.437 What are the purposes and objectives of public hearings for the IRR TIP, LRTP, and IRR projects? Comment:** As noted above, reorganize this section to group provisions on "public hearings" together. *NPRM provision 170.437 through 170.170.445 should precede 170.432 and 170.433.*

**170.439 How are public hearings for IRR planning and projects funded? Comment:** Strike the phrase "2 percent" in paragraph (a)(2) of this section as the statutory amount may change in reauthorization.

#### **Page 51386**

#### **IRR Inventory**

**170.449 How are transportation facilities added to or deleted from the IRR inventory?**

**Comment:** Revise the last sentence of this section reading: A BIA regional office "approves the submission [to the IRR inventory by a tribe] *if it is accurate* and the facility is eligible as an IRR facility." The phrase "if it is accurate" is capable of multiple meanings and it would be useful for the IRR regulations to more precisely define what is meant by an "accurate" inventory submission. All too often, tribal requests to the BIA to update a tribe's inventory are denied. This provision should cross reference other regulatory provisions which identify the content of an IRR inventory update or the "checklist" which BIA personnel will review when reviewing a tribal inventory submission (e.g., inventory submissions must include atlas maps, strip maps, functional classification of road, surface type, etc.).

#### **Page 51388**

#### **Construction and Construction Monitoring and Rights of Way**

**170.480 - .481 Can a tribe review and approve Plans, Specification and Estimate (PS&E) packages for IRR projects? and Who must approve all PS&E packages? For the reasons**

stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51338 in lieu of the Administration's proposal for these sections.

**Page 51389**

**170.485 - .489 Who has final acceptance of the IRR audit; When does a project closeout occur?; Who must conduct the project closeout and develop the report?; What information must be made available for the project closeout?; and Who is provided a copy of the IRR construction project closeout report? Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at pages 51339 - 51340 in lieu of the Administration's proposal for these sections.

**170.501 - .502 What must a right-of-way easement document contain at a minimum? and How are rights-of-way granted on Indian trust or restricted fee lands? Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51341 in lieu of the Administration's proposal for these sections.

**Program Reviews and Management Systems**

**Page 51390**

**170.515 and 170.516 How are IRR Program management systems funded? and How will the IRR management systems be implemented? Comment:** Strike the phrase "2 percent" in these sections as reauthorization of TEA 21 may specify a different percentage or methodology by which to calculate each tribe's IRR transportation planning funds.

**Subpart E - Service Delivery for IRR**

**Subpart E (170.601 -.636). Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51344 in lieu of the Administration's proposal for these sections and recommend that the Administration include provisions in the final IRR regulations as being within the scope of the rulemaking.

It is unfortunate that the TEA 21 Committee devoted months developing Service Delivery provisions to the NPRM and could not reach consensus. The Tribal Caucus position is reasonable and consistent with the goals and objectives set out at the beginning of these comments.

**Page 51393**

**170.614 - .618 Advance payments. Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at pages 51339-51340 in lieu of the Administration's proposal for these sections and recommend that the Administration include provisions in the final IRR regulations as being within the scope of the rulemaking. See, e.g., 25 U.S.C. 450l(c)(1)(b)(6).

**170.620 Can Indian tribes and tribal organizations performing under self-determination contracts or self-governance agreements keep savings that result from their administration of IRR projects or an entire IRR Program? Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51351 in lieu of the Administration's proposal for this section and recommend that the Administration include provisions in the final IRR regulations as being within the scope of the rulemaking. See, e.g., 25 U.S.C. 450j 1(a)(4); 25 U.S.C. 450j 1(n); 25 U.S.C. 450l(c)(1)(b)(6).

#### **Page 51394**

**170.633 - 170.634 What IRR PFSAs are subject to the construction regulations set forth in subpart K of 25 C.F.R. part 1000? and How are IRR program projects and activities included in the self-governance agreement? Comment:** USET objects to the Administration's narrow interpretation of TEA-21 and P.L. 93-638 and its insistence that tribes are assuming discrete construction projects and activities and not assuming IRR Program administration. The Cherokee Nation and the Red Lake Band of Chippewa Indians operate comprehensive IRR transportation programs under Self Governance agreements with the BIA. This program should be expanded to other eligible Indian tribes interested in compacting the IRR Program from the BIA, with the exception of the few inherently federal functions that the Secretary must retain by law. See NPRM page 51342 and Part III below.

**170.635 - .636 Are contract support funds provided in addition to the 2 percent (2%) IRR transportation planning funds? and May contract support costs for IRR construction projects be paid out of Department of the Interior or BIA appropriations? Comment:** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51350 in lieu of the Administration's proposal for whether contract support costs are available from Department of the Interior appropriations in addition to IRR funds for transportation planning and recommend that this issue be addressed in the final IRR Program regulations.

### **Subpart F Program Oversight and Accountability**

**170.700 - .705 IRR Program stewardship plan and stewardship agreement.** For the reasons

stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at page 51342 in lieu of the Administration's proposal for these sections. Indian tribes should have the authority, in the final IRR regulations, to enter into stewardship agreements directly with the FHWA and incorporate such agreements into P.L. 93-638 contracts and agreements.

**Page 51395**

**Subpart G BIA Road Maintenance**

The NPRM's proposed regulations (subpart G) addressing maintenance needs under the IRR Program are a significant improvement over the four sentences currently found at 25 C.F.R. 170.6.

The NPRM marks a significant departure from current regulations by devoting an entire subpart of the proposed rule to IRR transportation facility maintenance requirements. Indian tribes, as well as the Department of the Interior and Department of Transportation should point to subpart G of the NPRM as further justification to increase the Department of the Interior's and Department of Transportation's budgets for transportation maintenance activities carried out on IRR roads, bridges and other eligible transportation facilities.

Without adequate funding for facility maintenance needs, Federal funding for new construction has less impact because the useful life of such improvements is shortened by inadequate maintenance. Adequate maintenance funding will extend the useful life of the IRR transportation system.

**Subpart H Miscellaneous**

**Page 51399**

**Tribal Transportation Departments**

**170.938 - 170.939 Are there any other funding sources available to operate tribal transportation departments? and Can tribes use IRR Program funds to pay for costs to operate a tribal transportation department? Comment:** Although the list of eligible Federal and funding sources to finance a tribal transportation department (170.938) is not exhaustive, the list does not expressly provide for funding of Tribal transportation departments using IRR funds as partially suggested in 170.939. USET recommends revising 170.939. Although the answer to the question "Can tribes use IRR Program funds to pay for costs to operate a tribal transportation department?" is "yes," the answer appears to be qualified by the what follows: "Yes, Tribes can

use IRR Program funds to pay the cost of administration and performance of *approved IRR Program activities*.” Although IRR Program funds are limited, tribes may use such funds for transportation planning. As such, the NPRM should expressly site the IRR Program as an eligible funding source in 170.938 for tribes wishing to establish or maintain Tribal transportation departments. USET recommends striking the text of the first sentence of 170.939 after the word “Yes.”

**Page 51400**

**Arbitration Provisions**

**170.941 - .952 Alternative dispute resolution procedures.** For the reasons stated in Part III below, USET endorses the Tribal Caucus proposed regulatory text at 51343 in lieu of the Administration’s proposal for these sections.

**III. Key Areas of Disagreement (Non Consensus Issues)**

**A. General Issues -Subpart A**  
**(Plain words of the statute and canons of construction)**  
**(page 51336)**

**Comment:** USET fully supports the Tribal Caucus position that the plain words of TEA 21 must inform the participants to the Committee as they reconvene to complete the regulation drafting process. The preamble touches on this point at 67 Fed. Reg. 51336, but fails to capture the gravity of the Tribes’ concerns. Far too often, federal agencies advocate constrained readings of statutory language to advance policy positions at odds with the plain words of the statute and its overall purpose. TEA-21 is no exception. Regarding the issues of the BIA’s retention of the 6% funding; contractibility; advance funding; contract support costs as well as other non-consensus issues which USET addresses below, both the Interior Department and Department of Transportation’s narrow interpretations of TEA-21 yield results at odds with the plain language of the Act. When coupled with the long established canon of statutory construction which requires that statutes passed for the benefit of Indians are to be liberally construed with ambiguous provisions interpreted to the Indians’ benefit, USET finds it difficult to accept the BIA’s and DOT’s apparent misreading or mis-application of select provisions of TEA-21.

Prime examples of the Departments’ constrained reading of TEA-21 can be found their definition of “program” at Sec. 170.6 of the NPRM (page 51359-360) which appears to exclude non-contractible PFSAs, and in the departments’ expansive view of inherently federal functions which are not capable of assumption by a tribe or tribal organization. With the exception of a

few inherently federal functions, which by law may only be carried out by the Federal government, USET agrees with the Tribal Caucus and its reading of TEA-21 that:

“Notwithstanding any other provision of law or any interagency agreement, program guideline, manual or policy directive, *all* funds made available under this title for Indian reservation roads and for highway bridges located on Indian reservation roads to pay for the costs of programs, services, functions, and activities, or portions thereof, ... shall be made available ... to the Indian tribal government for contracts and agreements ... in accordance with the Indian Self Determination and Education Assistance Act.”

23 U.S.C. 202(d)(3).

In too many instances, the Federal view contorts the plain language of the statute under a reading the text will not bear.

USET endorses the Tribal Caucus definition of the term “program” which is defined as “any program, function, service activity, or a portion thereof” (similar to the Interior Department’s use of the term in 25 C.F.R. Part 1000). 42 C.F.R. 137.273 (page 35358)(final regulations implementing Title V of P.L. 93 638)(“What are IHS construction PSFAs?” “IHS construction PSFAs are a combination of construction projects as defined in 137.280 *and construction programs.*”).

As noted above, USET objects to the BIA’s conclusion (page 51335) that four areas of disagreement -- advance funding, savings, contractibility, and availability of contract support cost funding -- are outside the scope of this rulemaking. Here too, the Department of the Interior places obstacles to improving the IRR Program by placing issues of significance to tribes outside the scope of the rulemaking. During the nearly two years tribal and Federal officials spent crafting the NPRM, no federal officials claimed these issues were beyond the scope of the TEA-21 rulemaking. Rulemaking for Titles I, IV and V to P.L. 93-638, by the same Department of the Interior, stands as strong precedent for including these issues within the scope of the rulemaking and developing final, sensible, consensus regulatory provisions to instruct tribal and Federal officials in the implementation of the IRR Program.

It is inconsistent with the Congressional mandate of negotiated rulemaking to bargain over the wording of regulations covering these topics for two years, only to have the topics pulled off the table by unilateral and secret Federal action.

These issues fall within the broad purview of the Secretary’s negotiated rulemaking authority and the Committee should resolve them in a manner which supports the efficient

operation of the IRR Program. It should not be necessary, as was the case in 1994, for Congress to enact legislation directing the Department of the Interior to negotiate with tribes on specific regulatory topics with a firm deadline to have final regulations in place where the penalty for failing was for the agency to lose its rulemaking authority. See, P.L. 103-413, Oct. 25, 1994, 25 U.S.C. 450k(a).

In the non-consensus issues discussed below, USET recommends that the Tribal Caucus's proposed NPRM text, included in the preamble to the NPRM, be substituted for the proposed regulation advocated by the Administration.

**B. Eligibility - Subpart B** (page 51336)  
(proposed Sec. 170.116)

**Comment:** USET endorses the Tribal Caucus proposed regulatory text included in the preamble to the proposed rule. See, NPRM pages 51336-51337. USET finds the Federal Caucus's regulatory language at Sec. 170.116 (page 51362) to be unnecessary, burdensome and contrary to P.L. 93-638. The FHWA should not have a veto over a tribally assumed IRR program. The BIA, under TEA-21, has the authority to approve IRR projects assumed by tribes under a self-determination contract or self-governance agreement, notwithstanding general policy statements in 49 U.S.C. 101(b). USET agrees that the BIA's express statutory authority to approve projects independent of FHWA carries with it the ability to determine whether a proposed use of funds for a project is permissible.

The Tribally drafted regulatory text ("How can an Indian tribe determine whether a new proposed use of IRR funds is allowable?") (page 51336, col. 2) allows adequate flexibility for the BIA (to consult with FHWA if warranted), while at the same time imposing a strict time line of 45 days for the BIA to respond to the requesting tribe lines (45 days) on when written responses must be provided by the BIA to a requesting tribe. The final provision of the Tribal Caucus's proposal makes clear that an Indian tribe's ability to redesign IRR programs and reallocate funds, as authorized under P.L. 93-638 is not altered nor diminished by the Part 170 regulations. See, 25 U.S.C. 450j(j), 450j 1(o), 458cc(b).

USET views the Federal Caucus's proposed regulatory text as unworkable. No provision of federal law requires tribes to obtain the approval of the FHWA in advance of reprogramming or reallocating IRR Program funds when done in a manner consistent with P.L. 93-638.

**C. Updating the IRR TIP - Subpart D** (page 51337)  
(proposed Sec. 170.420)

**Comment:** No consensus reached by the USET with respect to a unified comment, however each Tribe may submit a comment for Subpart D Section 170.420.

**D. PS&E approval authority - Subpart D** (pages 51338-51339)  
(proposed Sec. 170.480-.481)

**Comment:** USET supports the Tribal Caucus position and endorses its proposed regulations clarifying that the review and approval of plans, specifications and estimate (PS&E) packages are activities that Indian tribes may assume under P.L. 93 638. See 67 Fed. Reg. 51338-51339. Precedent already exists for this under the IRR Self Governance Demonstration program. In addition, Indian tribes, as public authorities, may assume the authority to review and approve PS&E packages under a Stewardship Agreement directly with the FHWA.

Tribes may assume review and approval authority of PS&E packages under a Stewardship Agreement or pursuant to a self-determination contract or self-governance agreement. The self-determination contract or self-governance agreement may serve as the Stewardship Agreement. In the absence of a Stewardship Agreement, tribes may assume PE&E approval authority under a self determination contract or self governance compact with: 1) written assurances that the construction will meet or exceed proper health and safety standards; 2) advance review of PS&E packages by a licensed engineer who has certified that the plans meet or exceed applicable standards; and 3) a copy of the certification to the BIA. Of course, all PS&E packages must be signed or sealed by a licensed professional engineer.

The Federal position, which would require a tribe to meet “the requirements of a state as defined in 23 U.S.C. 302(a)” of TEA-21 and enter into a Tribal IRR Program stewardship agreement with DOT, is wholly unacceptable. This places far too much discretion in the hands of Federal officials (how does a tribe demonstrate that it has “adequate powers” or is “suitably equipped and organized to discharge to the satisfaction of the Secretary of Transportation the duties required.”). The Federal Caucus inappropriately extends provisions of TEA 21, *applicable to state transportation departments*, to Indian tribes. TEA-21 does not include “Indian tribes” within the definition of “States” nor do tribes receive their proportionate allocation of TEA-21 funds to meet state standards.

Equating tribes as states and imposing similar conditions is not mandated by TEA- 21 nor is it reasonable when Indian tribes receive only a fraction of the Federal funding state transportation programs receive to operate transportation programs. The BIA should be seeking ways to empower and enable tribes to take on these responsibilities, not use inappropriate statutory references to hamstring tribal efforts to assume greater responsibility and control for the IRR Program serving their communities.



**E. IRR Construction Project Reports - Subpart D** (pages 51339-51340)  
(proposed Sec. 170.485 - .489)

**Comment:** USET supports the Tribal Caucus position and endorse their proposed regulatory text contained in the preamble to the proposed rule (pages 51339-51340) that requirements for project audits are sufficiently addressed in existing regulations implementing Title I and Title IV of P.L. 93 638 (25 C.F.R. Parts 900 and 1000) and do not need to be duplicated in the TEA-21 regulations. USET supports augmenting the proposed TEA-21 regulations addressing the closeout of an IRR construction project to clarify which entity may accept the IRR construction project report.

USET agrees with the Tribal Caucus view that while it is appropriate for these proposed IRR regulations to identify the content of the project close out report when the BIA administers the IRR Program for a particular tribe, the regulations should leave the content of the IRR construction project close out report to the negotiations between the BIA and a tribe when a tribe assumes the obligation to prepare the close out report under an ISDEAA agreement. Final regulations should identify the recipients of the IRR construction project close out report, regardless of which entity prepares the report.

**F. Content of Rights of Way Documents - Subpart D** (pages 51341-51342)  
(proposed sec.170.501- .502).

**Comment:** USET agrees with and endorses the Tribal Caucus position (pages 51341-51342) that the content of right of way documents should be consistent regardless of the status of the property. USET therefore disagrees with the Federal position that 25 C.F.R. Part 169 (Rights of Way Over Indian Lands) is the sole or appropriate authority without proper qualification. Part 169 of Title 25 C.F.R. primarily sets out procedures by which third parties, not Indian tribes, obtain rights of way over reservation lands. USET understands that right of way was a significant topic of discussion during the 12 education sessions held during the comment period. USET hopes that the Administration was informed by the numerous comments made by tribal officials regarding the limitations of the NPRM's proposed provisions on right-of-way.

Many of the requirements of Part 169 are not applicable to Indian tribal governments which seek to secure rights of way for roads on their own reservations (see, e.g., 25 C.F.R. Part 169.4 (applicant must apply for permission to survey land; must demonstrate to the BIA's satisfaction its good faith and financial responsibility, etc.)). Part 169 further requires the applicant to indemnify the United States, the owners and occupants of the land, against liability for loss of life, personal injury and property damage and further requires a deposit to cover such

damages (see 25 C.F.R. 169.14). These are absurd and unnecessary provisions when a tribe is acting as the Federal government under a self-determination contract or self-governance agreement to build roads and bridges on its own reservation or lands.

USET agrees with the Tribal Caucus's proposals that the regulations of this section must be drafted to accommodate both Federal and tribal performance of right-of-way duties, and not focus solely on the standards applicable when the BIA carries out this activity. Therefore, the final regulations should limit Part 169 to "where appropriate." The Tribal Caucus's proposal accomplishes this at page 51341, col. 2 ("**What must the rights of way easement documents contain at a minimum?**" "... (b) Nothing in this part is intended to supersede the requirements of 25 C.F.R. part 169 *where part 169 is applicable to the right of way at issue.*") USET further agrees with the Tribal Caucus's view that the content of rights of way documents should be uniform and no arbitrary distinction should be made between trust, restricted fee or fee simple lands.

**G. Self Governance Compacts - Subpart E** (page 51342)  
(proposed sec. 170.633-634)

**Comment:** USET endorses the tribally recommended regulatory text at page 51342 and recommend that final regulations reflect that all provisions of 25 C.F.R. Part 1000 apply when an Indian tribe assumes IRR Program activities under a self governance agreement, unless otherwise clarified in the IRR regulations.

USET concurs with the Tribal Caucus view that the regulations of Subpart K of 25 C.F.R. Part 1000 (self governance regulations of the BIA) do not adequately or appropriately address issues arising when a tribe or consortium assumes IRR Program activities under a self-governance agreement. Subpart K of 25 C.F.R. Part 1000 regulations govern construction projects assumed under a self-governance agreement. IRR Program funding covers administration of the entire IRR Program, including administration, planning, design and construction activities. More specific guidance is required in these TEA-21 regulations to elaborate upon the provisions found in Subpart K of the Part 1000 regulations.

The disagreement between the Tribal Caucus and the Federal Caucus may stem from the minority view, within the Federal Caucus, that only projects, and not programs, are being assumed by Indian tribes and tribal consortium. This is not the case. These Part 170 IRR regulations should not unnecessarily constrain Indian tribes which seek to assume an entire transportation program under a self-determination contract or self-governance agreement when Congress has so clearly expressed its intent in support of greater tribal control and autonomy over the IRR Program.

**H. Content of Stewardship Agreements - Subpart F** (pages 51342-51343)  
(proposed sec. 170.701- .705)

**Comment:** Whether identified as a Stewardship Agreement or by some other name, USET agrees with the Tribal Caucus position at 67 Fed. Reg. 51342-51343 that Indian tribes may enter into an agreement directly with the FHWA and incorporate such agreement into a self determination contract or self governance agreement for operation of a PFSA of the IRR Program. Even without a direct agreement with the FHWA, Indian tribes should be permitted to review and approve PS&E packages. To afford Indian tribes the flexibility required to develop their own policies and procedures (which meet or exceed federal standards), USET agrees with the Tribal Caucus's proposed regulatory text set out in the proposed rule.

**I. Arbitration Provisions - Subpart H** (page 51343)  
(proposed sec. 170.941 - .952)

**Comment:** USET supports the Tribal Caucus view that all dispute resolution techniques and procedures authorized by the Indian Self-Determination Act and regulations of 25 C.F.R. Parts 900 and 1000 are applicable to disputes arising under these regulations. See, page 51343. USET believes that the federal position, developed after the close of the rulemaking process, is inconsistent with the Indian Self-Determination Act. The full Committee earlier recognized that the alternative dispute technique chosen must be "appropriate" for the situation. The federal position takes an unnecessarily narrow approach when interpreting the provisions of the Indian Self-Determination Act. If the Indian Self-Determination Act can be interpreted to permit a greater variety of dispute resolution techniques for resolution of conflicts between Indian tribes and the federal government, such interpretation should prevail.

**J. Advance Funding - Subpart E** (page 51393)  
(proposed sec. 170.614 - .618)

**Comment:** The full Committee reached agreement regarding the advance payment of IRR funds to Indian tribal governments performing IRR non-construction activities under self determination contracts and self governance agreements, but could not reach agreement over the wording of proposed regulations for the advance payment of IRR funds to tribal governments performing IRR construction and construction engineering activities. USET is especially concerned about the Federal assertion that advance funding and savings are outside the scope of the rulemaking. While the Committee was not able to reach consensus on these issues of crucial importance both to tribal self-determination and the efficient and effective implementation of the IRR program by Indian tribes, the issues are clearly relevant and plainly within the scope of the

rulemaking. USET strongly protests the unwarranted post facto attempt to limit the scope of the NPRM.

USET concurs with the Tribal Caucus that the Federal position is unwarranted as a matter of law and unwise as a matter of policy. USET endorses the Tribal Caucus's proposed regulatory language set out in the preamble to the proposed rule at pages 51344-51345 to authorize full annual advance funding as a useful and innovative financing tool.

Statutory authority already exists for the BIA to provide full advance payments. 25 U.S.C. § 450j 1(f); *see also* 25 C.F.R. § 900.19; 25 C.F.R. 900.125(b)(7) and .900.132(a); 25 U.S.C. § 458cc(g)(2). Quarterly advance payments are the *minimum amounts* authorized by law for self determination construction contracts (25 C.F.R. 900.132), but the BIA and contracting tribes may negotiate an advance payment schedule on terms even more favorable to the tribes up to and including full annual funding.

Good business judgment dictates that the BIA transfer limited IRR funds to Indian tribes as soon in the fiscal year as possible so that tribes may draw interest, administer the program, account for and utilize such funds to further the goals and objectives of the IRR Program. USET shares the view of the Tribal Caucus and the Congress, including such influential members as Senator John McCain, that there is nothing special or different about the IRR Program which suggests tribes cannot be trusted to receive and use advance funding for the good of the IRR Program to construct IRR roads and bridges. The Federal position, and proposed regulations, impose unnecessary and counterproductive micro management into a tribally-operated IRR program.

**K. Contractibility and Compactibility of TEA-21 Programs -  
Subpart E (pages 51345-51347)  
(proposed sec. 170.600 - .636)**

**Comment:** USET endorses the Tribal Caucus's approach to the contractibility/compactibility issue. See, pages 51345-51347. USET agrees that the Federal approach is inconsistent with TEA-21, P.L. 93-638 and the Interior Department's own controlling regulations implementing Title IV of P.L. 93-638. See, NPRM pages 78690, 78693 ("The Department will decide what functions are ... inherently federal *on a case by case basis* after consultation with the Office of the Solicitor"). Here again, USET must strongly object to the Federal attempt to shrink the scope of the rulemaking.

TEA-21 is clear. With the exception of those funds required by the Departments to perform the few inherently federal functions, "all funds" under Title 23 appropriated by Congress

to the IRR Program are to be made available to contracting and compacting tribes, including those funds necessary for carrying out administrative functions. The Tribal Caucus's proposed regulatory text offers a common sense approach to this issue. USET believes that the unless contracting a PFSA would violate a law, the PFSA is contractible and that a case by case review is required.

USET agrees that consultation and fair dealing with Indian tribes on the scope of retained/inherently federal functions should minimize disagreements and promote uniformity in the IRR Program. Where a tribe and the BIA cannot agree on whether a particular function is an inherently federal function, the tribal recommendation allows the parties to use existing dispute resolution processes under regulations implementing Title I or Title IV of P.L. 93 638.

Contractibility is within the purview of the rulemaking. P.L. 93-638 mandates that the Secretary of the Interior "upon the request of any Indian tribe by tribal resolution" enter into a self determination contract or contracts including construction programs. 25 U.S.C. 450f(a)(1). Only under specific enumerated findings, including that the "program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor," may the Secretary decline a contract application. See, 25 U.S.C. 450f(2)(E); 25 C.F.R. 900 subpart E. If a program, function, service or activity can be lawfully assumed by a tribe, the Departments must recognize the ability of a tribe to implement that program, function, service or activity as it sees best, subject to the law and applicable regulations. And the regulations must recognize the legal right of Indian tribes to implement the program, function, service or activity without all the constraints otherwise applicable to the federal government.

The IRR Program is severely underfunded. It is inconceivable that Congress would allow the BIA, under TEA-21 or its reauthorization, to retain scarce IRR funds as tribes assume greater control and administration over the IRR Program. The Federal Caucus's approach of attempting to define "otherwise contractible" PFSAs is unworkable and contrary to a plain reading of TEA-21 and its current practice under regulations implementing Title I and Title IV of P.L. 93 638.

USET also disagrees with the Federal Caucus view that it may remove from the table 6% of administrative funding under the IRR Program. The FY 1999 Omnibus Consolidated Appropriations Act provides that "*not to exceed 6 percent* of contract authority available to the [BIA] from the Federal Highway Trust Fund *may be used* to cover the road program management costs of the Bureau ... ." Emphasis supplied. USET further endorses the Tribal Caucus view that the 6% program management funds may also be used to fund IRR Program Management Systems as well as public hearings for IRR planning and projects. USET views the costs of these activities

as being “related to the cost of planning, research, engineering, and construction” as set out in 23 U.S.C. 202(d)(3)(A).

**L. Availability of Contract Support Funding - Subpart E** (page 51350)  
(proposed sec. 170.635-.636)

**Comment:** USET endorses the Tribal Caucus’s view and proposed regulatory text that contract support costs funds are to be included for IRR Program activities assumed under self determination contracts and self governance agreements. See, page 51350. The Federal view would have tribes pay their incurred contract support costs from IRR Program funds. Unless Indian tribes request, and Congress appropriates, adequate contract support cost funds for tribal administration of PFSAs assumed under P.L. 93-638, tribes will be forced to use direct service dollars for the payment of indirect cost expenses.

USET can think of no other form of government contract where the entity assuming the Secretary’s performance of a federal program is forced to “subsidize” or incur a financial penalty as a condition of accepting funding to administer a Federal program or project.

This issue goes to the core of the IRR Program’s potential and purpose. For this reason, USET again protests the Federal view that the Tribal position goes beyond the scope of the rulemaking. To continue to mask the true size of the administrative costs to Indian tribes to operate federal programs -- by narrowing the class of self-determination contracts and compacts eligible for contract support cost funds -- does a great disservice to all Indian tribes and undermines the statutory goal of P.L. 93-638, since 1988, to provide the “Secretarial” level of funding to tribes which assume such programs. Forcing tribes to subsidize contract support cost requirements by taking IRR construction funds is no solution. DOT and BIA should advocate for full funding of the IRR Program.

**M. Savings - Subpart E** (pages 51350-51351)  
(proposed sec. 170.620)

**Comment:** USET agrees with the view of the Tribal Caucus (pages 51350-51351) that the Federal proposed regulatory text for 170.620 improperly limits a tribe’s discretion to use savings associated with IRR projects or programs. See, pages 51350- 51351. To repeat, without elaboration, the mandate of 25 U.S.C. 450e-(2) that the Secretary of Interior must consult with tribes, adds nothing to the regulations and is over broad in its reach. First, the statutory provision was not meant to cover non-construction IRR activities. Second, the statute must be harmonized with 25 U.S.C. 450j-1(a)(4) which authorizes tribes to retain and use savings on cost-reimbursement construction contracts “to provide additional benefits or services under the

contract.” Third, the intent of the legislation concerned school construction activities and finally, final regulations implementing Title IV of P.L. 93 638 (25 C.F.R. Part 1000) already provide authority to tribes and tribal consortium to retain savings and use such funds, including savings realized under a construction contract, to provide additional services or benefits or as carryover. These regulations were promulgated after 25 U.S.C. 450e-2 became law. The Secretaries are free to do the same thing here.

It is unwise and impractical for the BIA not to implement the Secretary’s current thinking with regard to the use of savings under P.L. 93 638. USET therefore endorses the Tribal Caucus version and reiterate our views regarding the appropriate scope of the rulemaking. See, 25 C.F.R. 900.134 (“At the end of a self determination construction contract, what happens to savings on a cost reimbursement contract?”); 42 C.F.R. 137.341, 137.342 and 137.343 (final IHS regulations implementing Title V of P.L. 93-638) regarding construction regulations for “advance payments” to self governance tribes and use of “savings” under self governance construction agreements.

**N. Emergency Relief for Federally Owned Roads (ERFO) -**  
**Subpart H** (page 51399)  
(proposed sec. 170.924 - .932)

**Comment:** USET agrees with and endorse the proposed regulatory text of the Tribal Caucus concerning how tribes may access funds under the Emergency Relief for Federally Owned Roads (ERFO). The proposed text of section 170.924 .932 is prefaced by the following statement: “Sections 170.924 through 170.932 relating to emergency relief are provided for information only and do not change the provisions of 23 C.F.R. part 668 or existing guidance on emergency relief.”

The proposed Part 170 regulations, however, appear to affirm that Indian tribes should be able to initiate an ERFO damage claim directly to DOT in a manner *consistent with* 23 C.F.R. 668, Subpart B, rather than *through* the BIA as provided in the Federal proposal prior to publication of the NPRM. 23 C.F.R. Part 668 is applicable to federal agencies, not Indian tribes, and it does not prevent a tribe from submitting claims directly to the FHWA. The BIA and FHWA should honor the intent of Congress permitting Indian tribes to participate more directly in the operation of the IRR Program and implement the Tribal Caucus proposal to access these emergency funds. Prompt access to emergency funding should be the clear objective of all parties concerned.

Finally, USET endorses the view that there is no definite minimum dollar threshold to qualify for ERFO funding. USET read the proposed rule to reflect applicable law that there are

no arbitrary threshold dollar amount such as the \$500,000 limit advanced by some members of the Federal Caucus for Indian tribes to be eligible for such assistance. USET is again concerned that proposed section 170.924 unnecessarily suggests that the Emergency Relief provisions are beyond the scope of the IRR regulation.

USET appreciates the opportunity to submit its views on the proposed IRR regulations.





UNITED SOUTH AND EASTERN TRIBES, INC.  
711 Stewarts Ferry Pike • Suite 100 • Nashville, TN 37214  
Telephone: (615) 872-7900 • Fax: (615) 872-7417

---


**MEMO:**

BIO2003:021

---

Date: December 2, 2002

To: **USET Tribal Leaders**  
**USET Transportation Committee Members**

From: Tiffany D. Cheuvront, BIO 

Re: Re-Confirmation of TEA-21 Negotiated Rulemaking Committee  
Member/Alternate List

Attached please find a memo from the Department of the Interior (DOI), including a list of those members and alternates of the TEA-21 Negotiated Rulemaking Committee named in 1999, as well as those individuals (in parenthesis) who have become substitutes since 1999. As the committee will be convening in early 2003 to make recommendations for the final regulations based on the comments received, the DOI must confirm whether or not these individuals will be able to participate at that time.

Please contact LeRoy Gishi at (202) 208-4359 as soon as possible with your questions and changes.

*"Because there is strength in Unity"*