



[4337-15-P]

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 170**

**[201A2100DD/AAKC001030/A0A501010.999900 253G]**

**RIN 1076-AF45**

**Tribal Transportation Program; Inventory of Proposed Roads**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) is finalizing a change to a provision in the Tribal Transportation Program regulations affecting proposed roads that are currently in the National Tribal Transportation Facility Inventory (NTTFI). Specifically, this final rule deletes the requirement for Tribes to collect and submit certain data in order to keep those proposed roads in the NTTFI. The requirement to collect and submit data to add new proposed roads to the NTTFI remains in place.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. LeRoy Gishi, Division of Transportation, Office of Indian Services, Bureau of Indian Affairs, (202) 513-7711, [leroy.gishi@bia.gov](mailto:leroy.gishi@bia.gov).

**SUPPLEMENTARY INFORMATION:** Regulations governing the Tribal Transportation Program were published in 2016. *See* 81 FR 78456 (November 7, 2016). The regulations became effective on December 7, 2016, except for § 170.443, which required Tribes' compliance one year later: on November 7, 2017. Section 170.443 required Tribes to collect data for

proposed roads to be added to, or remain in, the NTTFI. BIA then further delayed the November 7, 2017, deadline for compliance with § 170.443 to November 7, 2019. *See* 82 FR 50312 (October 31, 2017), 83 FR 8609 (February 28, 2018). The purpose of the delay was to provide BIA with time to reexamine whether revision or deletion of the data collection requirements in § 170.443 would be appropriate. BIA staff then engaged in outreach at several regional and national meetings with affected Tribes and, on July 26, 2019, issued a proposal to apply the data collection requirements going forward to any new proposed road submission, but not to proposed roads that were already in the NTTFI as of the date of publication of the regulations on November 7, 2016, unless any changes or updates were or are made after that date. *See* 84 FR 36040. BIA then hosted three Tribal consultation sessions: September 5, 2019, in Minneapolis; September 10, 2019, in Anchorage, Alaska; and September 12, 2019, in Denver, Colorado.

## **I. Comments and Responses on the Proposed Rule**

BIA received 14 written comment submissions on the proposed rule. Approximately half supported the rule and half opposed. One participant in the Denver consultation opposed the proposed rule, while some participants at the remaining consultations expressed support and others expressed opposition to the rule.

### **A. Comments in Support of the Proposed Rule**

Several commenters, including Alaska Native Tribes and Tribal entities, were supported the rule. Among the reasons stated for support of the rule were:

- The rule will reduce Tribal expenses by not requiring the submission of data to maintain roads on the inventory.
- The rule is fairer, by removing the burden for those affected to go back and enter data for proposed roads that were added to the inventory when such requirements were not present.

- The rule eliminates a provision that was incompatible with the statutory requirement for the Secretary to maintain a national inventory that is comprehensive.
- The proposed roads must remain on the inventory, by law, because the statutory requirements for inclusion on the inventory have not changed since 2005.
- Removing the proposed roads from the inventory would waste the extensive investments that Tribes have already made in transportation planning and public engagement regarding these roads.
- Removal of proposed roads from the inventory would undermine the effort and expense in carrying out the FHWA-approved transportation planning processes, and have immediate effects in that certain Alaska Native Tribes could no longer work on critical access routes, or carry out route-staking that improves approximately 1,100 miles of winter trails to prevent injury and death for traveling between villages.
- Tribes do not have the resources to supplement existing data for all their proposed roads at once to maintain them on the inventory.

## **B. Comments Opposed to the Proposed Rule**

Representatives of several large, land-based Tribes and one Alaska Native corporation strongly opposed the proposed rule. The primary basis for opposing the rule was a concern that many of the proposed roads on the NTTFI that were submitted without data are essentially “ghost roads” that will never be built because they are not financially feasible or cannot legally be built (e.g., a proposed road crossing miles of ocean or within a National Wildlife Refuge) and were added for the sole purpose of increasing Tribal funding shares. These representatives stated that, by allowing these “ghost roads” to remain on the inventory, the rule would:

- Divert funding from existing roads in the NTTFI that are in need of repair and other proposed roads in the NTTFI that will actually be built.
- Exacerbate the current situation where the majority of funding is going to support non-reservation roads (State, county, and city roads comprise approximately 65% to 70% of the roads in the NTTFI) while there is a serious backlog of deferred maintenance at existing reservation roads.
- Continue to impose a discriminatory two-tier class system on Tribes in Alaska, where approximately 20% of Alaska Tribes, clustered in three Alaska Native regions, receive approximately 80% of the TTP funding made available in Alaska.
- Perpetuate the current disproportionate funding distribution, which according to a commenter, Congress has frozen until NTTFI data is “fixed.”
- Conflict with statutory requirements at 23 U.S.C. 134 and 135 that the proposed projects must be fiscally constrained because there would be no funding to build the majority of proposed roads that are currently in the NTTFI within a reasonable period.
- Reward those who disregarded Federal standards and BIA guidance regarding what data should be provided while punishing those that operated within the constraints for 20- and 30-year long-range planning requirements.

### **C. Other Comments**

One comment supported the rule overall but objected to enforcing the requirement for additional data when changes or updates to the inventoried roads occur, because updates should not trigger data collection in order to keep the road on the inventory.

## **D. Response to Comments**

BIA has determined, after consideration of all the input received during this rulemaking process, that removal of the requirement for data collection, as proposed, would be the most fair and de-regulatory course of action. Because the funding formula is prescribed by statute, and as established in 23 U.S.C. 202(b) uses data from the 2004 and 2012 inventory, there are currently no funding implications to maintaining these roads on the inventory. It is possible that Congress will change the formula or establish an entirely new formula at some point. To remove the proposed roads from the NTTFI in the meantime would unfairly disadvantage those who added proposed roads to the inventory under the data collection requirements at the time. BIA also determined that it is appropriate to continue to require the data to change or update inventoried proposed roads because the changes or updates will meet the intent of the original provision in the regulation in managing data increases in the inventory. The Department declines to speculate on whether or how Congress will change the formula and at what date – historical or future – Congress will choose for an inventory snapshot for use in the formula.

## **II. Procedural Requirements**

### **A. Regulatory Planning and Review (E.O. 12866)**

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and

freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

### **B. E.O. 13771: Reducing Regulation and Controlling Regulatory Costs**

This action is not an E.O. 13771 regulatory action because this rule is not significant under Executive Order 12866.

### **C. Regulatory Flexibility Act**

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It does not change current funding requirements and would not impose any economic effects on small governmental entities.

### **D. Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Will not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises.

### **E. Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

**F. Takings (E.O. 12630)**

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

**G. Federalism (E.O. 13132)**

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

**H. Civil Justice Reform (E.O. 12988)**

This rule complies with the requirements of E.O. 12988. Specifically, this rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

**I. Consultation with Indian Tribes (E.O. 13175)**

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule

under the Department's consultation policy and under the criteria in E.O. 13175 and have consulted with Tribes, as described above.

#### **J. Paperwork Reduction Act**

OMB Control No. 1076-0161 currently authorizes the collections of information contained in 25 CFR part 170, with an expiration of March 31, 2020. The current authorization totaling an estimated 23,448 annual burden hours. This rule will decrease the annual burden hours by an estimated 2,520 hours. This decrease is due to the elimination of the requirement for Tribes to provide information on proposed roads that are already included on the inventory. This change would require a revision to an approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq. for which the Department is requesting OMB approval.

*OMB Control Number:* 1076–0161.

*Title:* Tribal Transportation Program, 25 CFR 170.

*Brief Description of Collection:* The information submitted by Tribes allows them to participate in planning the development of transportation needs in their area; the information provides data for administration, documenting plans, and for oversight of the program by the Department. Some of the information such as the providing inventory updates (25 CFR 170.444), the development of a long-range transportation plan (25 CFR 170.411 and 170.412), the development of a Tribal transportation improvement program (25 CFR 170.421), and annual report (25 CFR 170.420) are mandatory to determine how funds will be allocated to implement the Tribal Transportation Program. Some of the information, such as public hearing requirements, is necessary for public notification and

involvement (25 CFR 170.437 and 170.438), while other information, such as a request for exception from design standards (25 CFR 170.456), is voluntary. The revision accounts for updates made to § 170.443, removing the requirement to provide information for proposed roads that existed in the inventory as of November 7, 2016. Comments on the removal of the requirement are addressed in the preamble, above.

*Type of Review:* Revision of a currently approved collection

*Respondents:* Federally recognized Indian Tribes.

*Number of Respondents:* 281 on average (each year).

*Number of Responses:* 1,504 on average (each year).

*Frequency of Response:* On occasion.

*Estimated Time per Response:* Varies from 0.5 hours to 40 hours.

*Estimated Total Annual Hour Burden:* 20,928 hours.

The recordkeeping requirements contained in section 170.472 are authorized under OMB Control No. 1076-0136, applicable to self-determination and self-governance contracts and compacts under 25 CFR 900 and 1000.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it displays a valid OMB Control Number.

#### **K. National Environmental Policy Act**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For

further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

**L. Effects on the Energy Supply (E.O. 13211)**

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

**M. Determination to Issue an Final Rule with Immediate Effective Date**

We are publishing this final rule with an immediate effective date, as allowed under 5 U.S.C. 553(d)(3). Good cause for an immediate effective date exists because the delay in publishing this rule would cause confusion, as the current regulation being replaced would otherwise go into effect on March 6, 2020.

**List of Subjects in 25 CFR Part 170**

Highways and roads, Indians-lands.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends 25 CFR part 170 as follows:

**PART 170 – TRIBAL TRANSPORTATION PROGRAM**

1. The authority citation for part 170 continues to read as follows:

Pub. L. 112-141, Pub. L. 114-94; 5 U.S.C. 2; 23 U.S.C. 201, 202; 25 U.S.C. 2, 9.

2. In § 170.443, revise paragraph (b) to read as follows:

**§ 170.443 What is required to successfully include a proposed transportation facility in the NTTFI?**

\* \* \* \* \*

(b) For those proposed roads that were included in the NTTFI as of November 7, 2016, the information in paragraphs (a)(1) through (8) of this section may be submitted for approval to BIA and FHWA at any time, but is not required in order for those proposed roads to remain in the NTTFI, unless any changes or updates to the proposed road were (or are) made after that date.

Dated: February 24, 2020

**Tara Sweeney,**  
*Assistant Secretary – Indian Affairs.*

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