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July 29, 2016

Via Electronic Mail
<http://www.regulations.gov>

Federal Docket Number
FHWA-2016-0002

The Honorable Anthony R. Foxx
Secretary
United States Department of Transportation
West Building
1200 New Jersey Avenue, SE, 9th Floor
Washington, D.C. 20590-9898

Re: Acting in Accordance with the Unique Government-to-Government Relationship
Between the United States and the Tribal Nations
Tribal Transportation Self-Governance Program Negotiated Rulemaking
Proposed Committee Membership and First Meeting
Federal Docket Number FHWA-2016-0002; RIN 2125-AF70

Dear Secretary Foxx:

On behalf of the following nine Indian tribes and Alaska Native villages, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Shoshone-Bannock Tribes, the Eastern Shoshone Tribe, the Shoshone-Paiute Tribes of the Duck Valley Reservation, the Karuk Tribe, the Native Village of Eyak, the Chickaloon Village Traditional Council, the Tlingit & Haida Central Council and the King Island Native Community, we write to comment on the July 27, 2016 "Notice of rulemaking committee meeting" published in the Federal Register by the Federal Highway Administration (FHWA) concerning the duration of the Negotiated Rulemaking Committee to develop regulations to extend the Tribal Self-Governance Program to

the Department and all its Modal Administrations (81 Fed. Reg. 49193-49195). Some of our tribal clients may write separately on other matters relating to the FHWA Notice.

We write to express our concern regarding FHWA's statements contained in the July 27, 2016 Notice (§IV. Future Committee Meetings and Rulemaking Calendar) which appears to depart from meaningful consultation between the Department of Transportation and the Indian nations by terminating the Negotiated Rulemaking Committee in mid-2017, or once a proposed rule is drafted by the Committee, and well before a final rule is published. Providing meaningful consultation with the Indian nations has been a hallmark of the Obama Administration which FHWA and the Department should honor in accordance with the authorizing legislation, Pub. L. 114-94, the "Fixing America's Surface Transportation Act" (FAST Act), the Negotiated Rulemaking Act, 5 U.S.C. §561 *et seq.*, and the Department's tribal consultation policy.

We request that Department of Transportation and FHWA officials, at the first meeting of the Department's "Tribal Transportation Self-Governance Program (TTSGP) Negotiated Rulemaking Committee," scheduled for August 16-18, 2016, in Sterling, Virginia, unequivocally confirm their intent to retain the Committee throughout the rulemaking process until a *final rule* is published in the Federal Register. We believe that the TTSGP Rulemaking Committee can operate within the statutory time frames set out in the FAST Act – like other tribal/federal negotiated rulemaking committees established to develop regulations to implement legislation enacted for the benefit of Indian tribes – without having to terminate the Committee prematurely before a final rule is published.

The Department's consultation with the tribal representatives to the Negotiated Rulemaking Committee is especially important *after* the Committee develops the proposed rule, as this is the period when the rule undergoes changes by individuals, federal and non-federal, who were not party to the negotiated rulemaking committee process. The entire Committee is best positioned to explain the rationale for the proposed and final rule.

President Obama signed the FAST Act on December 4, 2015. The FAST Act reauthorized the Tribal Transportation Program (23 U.S.C. §202), the Tribal Transit Program (49 U.S.C. §5311(c)) and authorized a new section of title 23 (23 U.S.C. §207) to be known as the "Tribal Transportation Self-Governance Program." Pub. L. 114-94, §1121. The legislation extending the Tribal Self-Governance Program to the Department of Transportation is largely based on the "Tribal Self-Governance Amendments of 2000," Pub. L. 106-260, which made permanent the Tribal Self-Governance Program within the Department of Health and Human Services (DHHS) (commonly referred to as title V of the Indian Self-Determination and Education Assistance Act (ISDEAA); Pub. L. 93-638, as amended).

Like Pub. L. 106-260, section 1121 of the FAST Act directs you, as Transportation Secretary, to initiate procedures under subchapter III of chapter 5 of title 5 (the Negotiated Rulemaking Committee Act), to “negotiate and promulgate such regulations as are necessary to carry out this section,” and to “*adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.*” See 23 U.S.C. §§207(n)(1)(A) and 207(n)(2)(C), as amended by the FAST Act. Emphasis supplied. Congress gave the Department 21 months to issue a proposed rule and the Department will lose its authority to promulgate regulations 30 months after enactment of the FAST Act (or after June 4, 2018). 23 U.S.C. §207(n)(1)(B) and (C).

We believe that the wording in the FAST Act concerning your discretion to adapt *procedures* for the negotiated rulemaking associated with self-governance and the government-to-government relationship extends not only to the composition of the committee but to its duration.

A number of federal laws, enacted for the benefit of Indian tribes and their members, have included a requirement for the appropriate agency/agencies to establish a negotiated rulemaking committee which, by practice and procedure, did not terminate until the *final rule* was promulgated. Like the FAST Act’s TTSGP, most of these laws included short timeframes for the agencies to develop a proposed rule. See e.g., Pub. L. 103-437; 25 U.S.C. §450k(d)(2)(A) and (D) (title I Indian Self-Determination and Education Assistant Act (ISDEAA)(1994)(initially providing 180 days for issuance of the proposed rule); Pub. L. 103-413; 25 U.S.C. §458gg (IV ISDEAA)(1994)(no timeframe to issue regulations); Pub. L. 104-430; 25 U.S.C. §4116(b)(2)(A) (Native American Housing Assistance and Self-Determination Act (NAHASDA))(requiring final regulations within 11 months of enactment); Pub. L. 105-178 (TEA-21), Sec. 1115(b)(2)(B) and (C) (Indian Reservation Roads (IRR) Program)(final regulations to take effect within 15 months of enactment); and Pub. L. 106-260; 25 U.S.C. §458aaa-16(b) (title V ISDEAA)(providing 12 months for a proposed rule and 21 months for a final rule). In some instances, the agencies secured extensions of time from Congress to complete the rulemaking process.

Despite this well established precedent, and the discretion afforded the Secretary, in its July 27, 2016, Notice, FHWA expresses its intent to terminate the TTSGP Negotiated Rulemaking Committee well before a final rule is developed. The notice states:

Decisions with respect to future meetings will be made at the first meeting and from time to time thereafter. . . . The FHWA has developed a provisional schedule of committee meetings, running through June 2017, which we plan to finalize with the committee during the first meeting. The FHWA intends to complete the negotiated rulemaking process for the proposed rule within the first

half of 2017 and to publish a NPRM, followed by a Final Rule in 2018. After the conclusion of the committee meetings, the Agency will draft the NPRM, which is expected to take approximately 6-8 weeks The NPRM will then be reviewed by DOT's Office of the Secretary and the Office of Management and Budget (OMB). The Agency will then publish the NPRM for public comment. Following the close of the public comment period, the Agency will evaluate and respond to public comments as it [the Agency] drafts a final rule, which will also undergo Departmental and OMB review. Although the time needed to address public comments to an NPRM that has been developed through a successful negotiated rulemaking process is typically shorter . . . the Agency must nonetheless address substantive public comments in the final rule, in accordance with the Administrative Procedure Act. While the Agency cannot state with certainty the time required to complete the negotiated rulemaking process and notice and comment rulemaking, the target date for publication of an NPRM is September 2017.

81 Fed. Reg. 49193, 49195, IV. Future Committee Meetings and Rulemaking Calendar (July 27, 2016). Emphasis supplied.

As you can see from the highlighted text, our tribal clients are concerned that the Department, in its haste to complete a final rule within the statute's 30 month grant of authority, will terminate the Committee after the proposed rule is drafted, and therefore will not consult with the tribal representatives to the Committee regarding such important matters as:

- i) changes made by the Department to the NPRM following the Department's and OMB's clearance of the NPRM;
- ii) developing the preamble to the NPRM;
- iii) revising the final rule as a result of public comments received;
- iv) drafting the preamble text to the final rule explaining the rule and changes made from the proposed rule; and
- v) developing the preamble text discussing disagreements between the tribal representatives and the agency and the disposition of those disputes.

We and our tribal clients believe that the proper course is for the Negotiated Rulemaking Committee to jointly draft the NPRM, rather than the Agency alone, and that the Committee, as a whole, should evaluate and respond to the public comments, determine whether changes to the final rule are warranted as a result of comments, and explain the rationale for the final rule.

Under the Negotiated Rulemaking Act, a negotiated rulemaking committee terminates "upon promulgation of the *final rule* under consideration," unless stated otherwise. *See* 5 U.S.C. §567. Emphasis supplied. The development of regulations to extend the Tribal Self-Governance

Program to the Department of Transportation is too important to be carried out in haste when a more deliberate approach can result in a better rule. Furthermore, with a new administration taking office in January 2017, during the rulemaking, delays are likely. Taking a more deliberate approach to the rulemaking process will, in the end, save more time and expense.

The rulemaking process to implement regulations extending the Tribal Self-Governance Program to the Department and all its Modal Administrations is a shared responsibility between sovereigns. The Department of Transportation should view the entire negotiated rulemaking process – in and of itself – as an exercise in empowering tribal leaders and tribal governments by involving the tribal representatives to the negotiated rulemaking committee in the intimate work of crafting the final rule for the TTSGP, consistent with the goals of the Department’s tribal consultation policy and the spirit and intent of the Indian Self-Determination and Education Assistance Act.

The vetting process within the Department of Transportation, including the Office of the Secretary, and within OMB, prior to publication of both the NPRM and final rule, is perhaps the most crucial and important stage in the rulemaking process. It is during these stages when the work product of the Negotiated Rulemaking Committee is most at risk. Who better to explain the work product of a Negotiated Rulemaking than the committee representatives who drafted it, who know it best, and where tribal representatives often compromised and made concessions in order to complete the rule.

It is often the case that officials within the Department and OMB, who took no role in the rulemaking process, make substantive changes to the proposed and final rule that inadvertently undue carefully crafted compromises reached during the rulemaking process. Unless the full Negotiated Rulemaking Committee reconvenes, to examine the proposed or final rule, such changes may go unchallenged or lead to unintended consequences and open the final rule to criticism and legal challenge.

Such undesirable results can be avoided if the Department honors and respects the purposes of maintaining a Negotiated Rulemaking Committee until a final rule is published. It is in the give-and-take of crafting the final rule, as much as in developing the proposed rule, that the internal workings of the federal government are best understood and appreciated by the Negotiated Rulemaking Committee through thoughtful deliberation by the individuals who know the rule best.

The Negotiated Rulemaking Act further provides that nothing in the Act “should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.” 5 U.S.C.

§561. As noted above, the Act clearly contemplates a Negotiated Rulemaking Committee remaining together until the final rule is promulgated. There is well documented precedent, including the negotiated rulemaking FHWA undertook with the Bureau of Indian Affairs (BIA) for the IRR Program, for Tribal/Federal Negotiated Rulemaking committees to remain in place until the final rule is promulgated when agencies are charged with developing regulations for federal legislation enacted for the benefit of Indian tribes.

Finally, should the Department conclude that the wording of Section 207(n) of title 23 is ambiguous as concerns the duration of the rulemaking committee, the federal trust responsibility owed to the Indian nations requires that acts of Congress be “construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (canon of construction “rooted in the unique trust relationship between the United States and the Indians”); *County of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251,269 (1992); *Washington v. Washington Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675-76 (1979); *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Menominee Tribe v. United States*, 391 U.S. 404,412-13 (1968); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941).

In conclusion, for the above-stated reasons, we believe that the work product of the Negotiated Rulemaking Committee for the Tribal Transportation Self-Governance Program will be greatly enhanced by retaining the Committee and its tribal representatives throughout the rulemaking process until a *final rule* is published. The Committee is best able to explain the proposed rule during the agency clearance process, work in partnership to examine the public comments, revise the final rule as necessary, jointly draft the preamble text setting out the rationale for the final rule, and to explain differing positions when consensus is not possible.

We urge the Department to reconsider any decision to terminate the TTSGP Negotiated Rulemaking Committee other than upon publication of the final rule and to reflect in the charter of the Committee that it will operate to assist the Department develop the proposed and final rule extending the Tribal Self-Governance Program to the Department and all its Modal Administrations. Such a decision is consistent with a true government-to-government relationship and in keeping with the spirit and intent of the Indian Self-Determination and Education Assistance Act.

The Honorable Anthony R. Foxx
July 29, 2016
Docket No. FHWA-2016-0002
Page 7

Thank you for affording us the opportunity to comment on the agenda for the first meeting of the TTSGP Negotiated Rulemaking Committee.

Respectfully submitted,

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