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August 29, 2017

Summary of the
“John P. Smith Tribal Road Safety
and Infrastructure Investment Act of 2017”
(TTUC Discussion Draft)

Join Jim Glaze, Matt Jaffe, tribal representatives, transportation advocates and others on August 30, 2017, in a discussion of the proposed “John P. Smith Tribal Road Safety and Infrastructure Investment Act of 2017.” We seek tribal input to finalize a proposal that can be supported by the Tribal Transportation Unity Coalition (TTUC), Indian tribes and tribal organizations to present to Congress this fall for inclusion in any national infrastructure initiative the Administration and Congress advance in the 115th Congress.

The “John P. Smith Tribal Road Safety and Infrastructure Investment Act of 2017” honors the life and legacy of the late “Big John” Smith, the long-time Transportation Director for the Eastern Shoshone and Northern Arapaho Tribes, Executive Director of the Inter-Tribal Transportation Association (ITA), the Tribal Chairman and Rocky Mountain Regional Representative to the Tribal Transportation Program Coordinating Committee (TTPCC) and the 2014 recipient of the White House’s “Champions of Change” award for Transportation.

Where: GoToMeeting
When: Wednesday, August 30, 2017
Time: 2:00 pm Eastern/11:00 am Pacific
How: <https://www.gotomeet.me/Sonosky>

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The discussion draft enclosed with this summary modifies provisions included in:

- 1) Wyoming Senator John Barrasso’s S. 302 (“John P. Smith Act”) , introduced earlier this year, which accelerates road safety projects eligible for a “categorical exclusion” (CE) under NEPA;
- 2) proposed legislation (not yet introduced in the House of Representatives) by New Mexico Congressman Ben Ray Lujan that would improve the requirements for rights-of-way over Indian

lands; and 3) proposals of the Tribal Transportation Unity Coalition from 2014 – not enacted into law in the 2015 “Fixing America’s Surface Transportation (FAST) Act, Pub. L. 114-94 – which have been updated to reflect the level of Federal appropriations required to kick-start transportation infrastructure construction projects and highway safety improvements on Indian reservations and in Alaska Native villages.

Title I – John P. Smith Tribal Road Safety Program

Subtitle A

Sections 101 – 103 – Application of Categorical Exclusions to Certain Tribal

Transportation Facilities – Sections 101 to 103 incorporate the provisions of S. 302 which allows an Indian tribe undertaking a “tribal transportation safety project,” (i.e., the 2% takedown under 202(e) of the Tribal Transportation Program for competitive highway safety projects) to satisfy environmental requirements under the National Environmental Protection Act (NEPA) by qualifying the project for a “categorical exclusion” (CE) issued by the Secretary of the Interior or Secretary of Transportation. The text sets firm deadlines for the Secretary of the Interior to issue regulations identifying projects eligible for the CE designation.

Section 104 – Programmatic Agreements for Categorical Exclusions – Section 104, also from S. 302, directs the Secretaries of the Interior and Transportation, as appropriate, to enter into “programmatic agreements” with an Indian tribe, at an Indian tribe’s request, which allows the tribe to determine, on the Secretary’s behalf, whether a project is categorically excluded from the preparation of an environmental assessment (EA) or environmental impact statement (EIS) under NEPA, and therefore eligible for a “categorical exclusion” (CE).

We modified Sec. 104(a) of S. 302 in two ways. First, we clarified that a “programmatic agreement” *includes* any award instruments available to an Indian tribe to receive Tribal Transportation Program (TTP) and other transportation funds. These award instruments include contracts and compacts under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, a compact entered into with the Secretary of Transportation under section 207 of title 23, United States Code, and contracts and agreements with the Bureau of Indian Affairs (BIA) and Federal Highway Administration (FHWA) entered into under 202(a)(2)(B) (BIA G2G agreements) and 202(b)(6) and (7) (FHWA TTP Agreements and RFAs).

Second, because existing award instruments between Indian tribes and BIA and FHWA do not require a waiver of sovereign immunity from suit, we added a new paragraph (c) to section 104 to clarify that no waiver of sovereign immunity is required as a condition for an Indian tribe to include the “programmatic agreement” text negotiated with the respective Secretary in its existing award instrument with the BIA or FHWA, or in any other agreement.

Subtitle B

Sec. 110 – Other Tribal Road Safety Improvements – Section 110 of the proposed bill amends provisions of title 23, United States Code, to carve out Tribal set-asides within national highway safety programs.

- 1) Section 110(a) amends section 104(b)(3) of title 23 to establish a 2% set-aside for Indian tribes from the surface transportation program allocated to the States for “highway safety improvement program” to augment the TTP’s section 202(e) safety program;
- 2) Section 110(b) amends section 402(c)(2) of title 23 to increase the set-aside to the Secretary of the Interior under that section for the Interior Department’s “Indian Highway Safety Program” from 2 percent to 3 ½ percent;
- 3) Section 110(c) amends section 133(h) of title 23, relating to the FAST Act’s “surface transportation block grant program,” to establish a tribal set-aside of 3 percent within the “STP set-aside” for what were known as “transportation alternatives” under MAP-21.

Title II – Streamlining Tribal Transportation Systems

Sec. 201 – Improving Rights-of-way Record Keeping on Indian Lands – Sec. 201 of the discussion draft incorporates legislation Congressman Lujan has been working on for a number of years to improve BIA rights-of-way over Indian lands. The text requires the BIA, upon request of an Indian tribe, to provide documentation within 120 days of valid right-of-way for existing facilities on Indian lands owned by the BIA or the tribal government and eligible for inclusion in the NTTFI. Should valid right-of-way not exist, the Secretary is required, in consultation with the tribe, to develop a schedule and plan to acquire such right-of-way and to acquire, by purchase or otherwise, the right-of-way within one year. The text further authorizes an Indian tribe, in the event the Secretary fails to act within the prescribed periods, to assume the Secretary of the Interior’s duties for acquiring right-of-way for a tribal transportation facility.

Section 201 also directs the Secretary of the Interior, within three years of enactment of the legislation, to complete a comprehensive national update of rights-of-way records for existing facilities located on Indian lands and to computerize and organize such records and to make such records available to the public in a commonly used mapping format. The section also clarifies that an Indian tribe, administering a project that crosses Indian lands that are owned entirely by the tribe, need not obtain a right-of-way and at the tribe’s request, the Secretary shall record a tribal government’s dedication of such land for a public purpose and include such dedication in

the Secretary's database. Section 201 authorizes an appropriation of \$10 million for each of fiscal years 2018 through 2023 to carry out the intent of the legislation.

Sec. 202 – Facilitating the Transfer of Funds for Tribal Projects – Section 202 of the proposed draft amends section 202 of title 23 in a number of ways to expand the scope of existing award instruments between Indian tribes and BIA and FHWA to accept a broader array of Federal program funding.

- 1) Section 202(a) amends section 202(b)(6) of title 23 (Contracts and agreements with Indian tribes) to provide that all funds made available to the Secretary of the Interior under title 23 (highways) or chapter 53 of title 49 (transit) to pay the costs of PFSA's for the planning, engineering, and construction of tribal transportation facilities shall be made available upon the request of an Indian tribe for contracts and agreements in accordance with the Indian Self-Determination and Education Assistance Act.
- 2) Section 202(b) amends section 202(b)(7)(A) of title 23 (Contracts and agreements with Indian tribes) to similarly require that all funds made available to an Indian tribe under title 23 (highways) and chapter 53 of title 49 (transit) shall be made available to a tribe by the Secretary of Transportation, upon the request of an Indian tribe, for contracts and agreements in accordance with the Indian Self-Determination and Education Assistance Act.
- 3) Section 202(c) amends section 202 of title 23 to add a new subsection that would clarify that an Indian tribe may apply directly to the Secretary of Transportation and receive from the Secretary any discretionary and competitive grant made available to a State or political subdivision of a State under title 23 or chapter 53 of title 49, in the same manner and under the same circumstances as a State or political subdivision of a State. The intent of the provision is to make tribes direct recipients, rather than sub-recipient of a State or political subdivision of a State for receipt of a Federal grant.

Title III – Innovating Tribal Transportation Infrastructure Initiatives

Sec. 301 – Tribal Infrastructure Bank – Section 301 directs the Secretary of Transportation to establish a Tribal Infrastructure Bank to make loans and provide other forms of credit to Indian tribes for highway and transit projects. The bank would be funded with annual appropriations of \$8.5 million (Highway Account) and \$1.5 million (Transit Account), from the Highway Trust Fund, for fiscal years 2018 through 2026.

Sec. 302 – National Tribal Asset Management Program – Section 302 amends section 201(c)(5) of title 23, Federal lands and tribal transportation programs planning, to direct the Secretary of Transportation, in cooperation with the Secretary of the Interior, to create and implement a national tribal asset management program, the purpose of which is to provide

support for the condition and performance of tribal transportation facilities and systems, and to ensure that federal investments are directed to support progress toward achieving performance targets identified in the National Highway Performance Program (23 U.S.C. § 119). Section 302 authorizes appropriations of \$50 million in FY 2018, with stepped increases of \$5 million annually, up to \$75 million for fiscal years 2023 through 2026.

Title IV – Tribal Transportation Infrastructure Investments

Sec. 401(a) – Tribal Transportation Program (TTP) Infrastructure Investment – Section 401, like the entire Title IV of the draft bill, assumes that the Administration and Congress will advocate for a one trillion infrastructure proposal, with an estimated federal contribution of \$500 billion over a ten-year term, with the remainder of funding to be obtained through private investment (P3s) and other cost-saving measures. At a minimum, Indian tribes seek *parity* with the States for the direct receipt of Federal funding for transportation infrastructure projects.

To address the large, unmet transportation infrastructure needs of Indian reservations and Alaska Native villages, section 401 would appropriate \$500 million out of the Highway Trust Fund (other than the Mass Transit Account) for each fiscal year FY 2018 through FY 2026, to augment annual funding for the Tribal Transportation Program authorized under the FAST Act and appropriated by Congress in the Transportation and Housing and Urban Development (T/HUD) annual appropriation measure. This figure is roughly the FY 2020 authorized level of funding for the TTP under the FAST Act. The additional funds would be allocated among Indian tribes using the existing statutory formula for the Tribal Transportation Program. Any funds that have not been obligated by the Secretaries within 18 months of their appropriation will be available for redistribution among eligible tribes. The federal share of projects funded will be 100 percent and nothing in section 401 shall affect the distribution of funds provided under the TTP.

Sec. 401(b) – Tribal Transportation Facility Bridge Program – Section 401(b) would augment the Tribal Transportation Facility Bridge Program of section 202(d) (the 3 percent takedown of TTP funds providing competitive grants for the reconstruction and replacement of structurally deficient or functionally obsolete bridges included in the National Bridge Inventory), by appropriating \$75 million each year for fiscal years 2018 through 2026, out of the Highway Trust Fund (other than the Mass Transit Account), to remain available for three years, for eligible projects under section 202(d). This funding level is five times the current 3 percent set-aside for the Tribal Transportation Facility Bridge Program. Unlike the 202(d) program, section 401(b) would allow the additional funds to be used for the design and construction of *new* bridges.

Sec. 402(a)(1) – Tribal Transit Program Infrastructure Investment (competitive grants) –

Section 402(a)(1) amends section 5311(c)(1)(A), public transportation on Indian reservations, to increase annual appropriations for the competitive Tribal Transit Grant program from \$5 million to \$10 million (from the Mass Transit Account of the Highway Trust Fund), beginning in FY 2018, with stepped increases of \$5 million annually to \$35 million for FY 2023 through FY 2026.

Sec. 402(a)(2) – Tribal Transit Program (recurring formula transit grant program) –

Section 402(a)(2) amends section 5311(c)(1)(B) to increase annual recurring formula grants to Indian tribes from \$30 million to \$45 million for FY 2018, with stepped increases of \$5 million each year to \$75 million for FY 2024 through FY 2026.

Sec. 402(b) – Tribal Transit Formula Grants – Section 402(b) amends section 5311(j) of title 49, to require the Secretary of Transportation, before calculating formula grants for the Tribal Transit Program, to ensure that an Indian tribe that received a public transportation (transit) grant under SAFETEA-LU during fiscal years 2005 through 2012, receives no less than the amount awarded to the tribe under a Tribal Transit Grant award made to it during that period. Additional data may be required to ensure that sufficient funds are appropriated in the initial years to fully fund the highest level competitive tribal transit program grant made to an Indian tribe during that period while ensuring that tribes receiving recurring formula grants for their Tribal Transit program receive no less than the prior year's allocation of 5311(c) funds. We welcome any data quantify the funding level required to cover competitive Tribal Transit Program grants made by the Federal Transit Administration (FTA) during the eight-year period of FY 2005 – FY 2012 under section 3013(c) of SAFETEA-LU.

Sec. 403 – Nationally Significant Federal Lands and Tribal Projects Program – Section 403 amends section 1123 of the FAST Act which established the Nationally Significant Federal Lands and Tribal Projects Program. Congress created the program in 2015, and authorized an appropriation of \$100 million, out of the U.S. Treasury, to fund projects having a minimum cost of \$25 million and providing preference for projects with a cost of \$50 million or higher. Congress has not appropriated any funds for this program since enactment.

The amendment would accomplish two important goals: first, it would fund the program at \$100 million for each fiscal year FY 2018 through FY 2026 out of the Highway Trust Fund (other than the Mass Transit Account); and second, the amendment would carve out a lesser threshold of \$1.5 million for tribal transportation projects listed on the National Tribal Transportation Facility Inventory, and give preference for any tribal project with an estimated cost equal to or exceeding \$3 million. This will ensure that Indian tribes can compete for grants from the Nationally Significant Federal Lands and Tribal Projects Program within available funding.

Sec. 404 – Tribal High Priority Projects Program – Section 404 amends section 202 of title 23 to establish a tribal high priority projects program to fund an Indian tribe’s highest priority project (up to \$1.5 million) or to provide emergency assistance (up to the level of the emergency/disaster) for damages caused to transportation facilities. The amendment directs the Secretary of Transportation and Secretary to establish a list of eligible applicants, using statutory criteria to rank each application (e.g., existence of safety hazards with documented fatality and injury data resulting from crashes, number of years since a tribe last completed a project, readiness to proceed, matching funds, if any, request level, geographic isolation, all weather access), and fund eligible projects with available appropriations (carrying over unfunded projects on the list from one year to the next). Section 404 would authorize appropriations of \$35 million for FY 2018 (out of the Highway Trust Fund (other than the Mass Transit Account)), with stepped increases of \$5 million per year to \$50 million for FY 2024 through FY 2026.

We welcome your comments and recommendations to the John P. Smith Tribal Road Safety and Infrastructure Investment Act of 2017 and look forward to speaking with you on August 30th.

Respectfully Submitted,

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Enclosure (Discussion Draft)