



March 15, 2015

U.S. Department of the Interior Attention:
Elizabeth Appel, Office of
Regulatory Affairs Attention:
1849 C Street NW
Washington DC 20240

Re: Bureau of Indian Affairs' (BIA) proposal to update 25 CFR Part 170, Tribal Transportation Program
1076-AF19

To Whom It May Concern:

The American Land Title Association¹ (ALTA) on behalf of its Native American Lands Committee (NALC) appreciates the opportunity to comment on the Bureau of Indian Affairs' (BIA) proposal to update 25 CFR Part 170, Tribal Transportation Program. ALTA believes that to achieve the BIA's goals of ensuring that tribes have viable, identifiable transportation facilities and promoting efficient land use while protecting tribal sovereignty that certain clarification is needed in some of the definitions. The clarifications we propose below will help eliminate potential confusion and ensure that actions taken by tribes and the BIA under Part 170 are documented, on record and available to interested parties upon request.

Moving Ahead for Progress in the 21st Century (MAP-21), Public Law 112-141, recently extended by the Highway and Transportation Funding Act of 2014, Public Law 113-159 (August 8, 2014) made a number of changes to the Indian Reservation Roads (IRR) Program, including striking the existing laws governing the IRR Program from 23 U.S.C. 201-204 and establishing the Tribal Transportation Program (TTP). Additionally, MAP-21 provided new definitions for terms utilized in the TTP, created a new formula for distribution of TTP funds among tribes and identified how certain transportation facilities included in the National Tribal Transportation Program Facility Inventory (NTTFI) impact funding within the new formula. In addition to reflecting these changes, the proposed rule codifies the requirements that proposed transportation facilities (f/k/a Indian Reservation Roads) must meet in order to be added to or remain in the NTTFI.

¹ The American Land Title Association, founded in 1907, is a national trade association and voice of the real estate settlement services, abstract and title insurance industry. ALTA represents over 5,400 member companies. With more than 8,000 offices throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations to large national title insurers.

Replace the use of Owner with the term Public Authority Proposed 25 C.F.R. 170.5 (Definition of National Tribal Transportation Inventory): The definition of *National Tribal Transportation Inventory* lists a series of criteria to be met for a transportation facility to be listed in the NTTFI. However, it does not provide sufficient definitions for each criteria. Criteria (2) and (3) require that the transportation facility be “owned by” an Indian tribal government or “owned by” the Bureau of Indian Affairs (BIA). The term “owned” is defined by reference to 23 U.S.C. 101(a)(20). However, 23 U.S.C. 23 101(a)(20) says nothing about ownership. Rather, it defines *Public authority*. The term “owner” is not defined in the statute or in the regulation. Additionally, *Public authority* is defined independently in proposed 25 C.F.R. 170.5 to mean “a Federal, State, county, town or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate or maintain toll or toll-free roads” – just as it is defined in 23 U.S.C. 101(a)(20). The result of defining “owner” in the context of the statutory definition of *Public authority* is confusing. To avoid confusion, we recommending eliminating the word “owner” and substituting in its stead “Public authority” in Criteria (2) and (3). This change also will make clear that a state, county or local transportation facility also may be listed in the NTTFI.

Expand Minimum Documentation Requirements for to Existing facilities in Proposed 25 C.F.R. 170.443 and 170.444 (Minimum Documentation): While Proposed Sections 170.443 and 170.444 require tribes to submit minimum documentation to BIADOT/FHWA Quality Assurance in order to have a proposed transportation facility placed on the NTTFI, no such requirement exists in order for existing transportation facilities to remain on the NTTFI. This inconsistent treatment will make it more difficult for economic development professional to determine what steps need to be taken.

It is critical that certainty exist respecting the ownership and right of the public to use transportation facilities that provide access to, or through, Indian land. Historically, ensuring that rights of way were properly granted and documented has been inconsistent. That inconsistency invites uncertainty and, in some cases, unwitting trespass on Indian lands. Improving the protocol for obtaining and maintaining documentation for existing, as well as proposed, transportation facilities is imperative to eliminate uncertainty that hinders economic development on Indian land, while protecting tribal sovereignty.

As currently proposed, 25 CFR 177.444 requires a tribe to submit documentation only if it wishes to change/update its NTTFI list. See 25 CFR 170.444(a)(2). We recommend that documentation also be required for transportation facilities to remain on the NTTFI. Implementing this change could be phased in over time so as not to overburden tribes. Additionally, once the documentation is submitted, the tribe need not re-submit unless it wishes to change or update the database.

Require Documentation be Recorded with LTRO in Proposed 25 C.F.R. 170.443, 170.444 and 170.446 (Recordation): As proposed, Sections 170.443, 170.444 and 170.446 require submission of documents by tribe to BIA. However, there is no requirement that any of such documents be filed for record with the BIA Land Titles and Records Office (if related to Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal Government) or with the documents repository designated by applicable State law for giving constructive notice of interests in real property (if related to non-Indian land). Reliance on unrecorded documents creates uncertainty and undermines the goals of promoting efficient land use and community and economic development on Indian land while protecting tribal sovereignty. Obtaining insurance for access may not be possible absent evidence that rights of way have been properly authorized by the tribe or other Indian landowner and granted by the BIA.

We recommend that, minimally, the grant of right of way and Indian landowner's consent (e.g., a tribal council resolution or individual) to public use be filed for record and be available to interested parties (including title insurers) upon request.

Proposed 25 C.F.R. 170.444 (Notice): As proposed, notice to, and a right to comment by, the grantee of a right of way or other authority to finance, build, operate and/or maintain is not a condition precedent to a tribe changing/updating the facilities on the NTTFI. As a result, a tribe may remove a facility, effectively eliminating the public use condition and eliminating the potential for a share of funding for maintenance.

We recommend revising Section 170.444 to require notice to, and an opportunity by, the facility owner to comment on any request by the tribe to remove a facility from the NTTFI.

Should you have any questions about this comment letter, please contact Madeleine Nagy, Director of State Government Affair, at madeleine@alta.org or 202-261-2949.

Sincerely,



Michelle L. Korsmo
Chief Executive Officer