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MEMORANDUM 122-11

November 14, 2011

By Email

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TO: Tribal Transportation Coalition Clients

FROM: Sonosky, Chambers, Sachse, Endreson & Perry, LLP

SUBJECT: Senate EPW Committee Approves Two-Year Highway Reauthorization Bill “Moving Ahead for Progress in the 21st Century” (“MAP-21”); Bill Overhauls IRR Program and Funding Formula

I. Introduction

On Wednesday, November 9, the Senate Environment and Public Works (“EPW”) Committee unanimously approved its proposed two-year highway reauthorization bill, “Moving Ahead for Progress in the 21st Century” (“MAP-21”), S.1813. Throughout this memorandum, we refer to the legislation as MAP-21 or S.1813. While the measure was reported out of the EPW Committee unanimously, many of the Committee Members announced their intent to introduce amendments on the Senate floor, but overall expressed broad support for the bill. However, Senators James Inhofe (R-Ok), Ranking Member of the EPW Committee, and Jeff Sessions (R- Ala), expressed their concern that the bill would not pass the Senate if no solution was found for the \$12 billion shortfall MAP-21 would create in the Highway Trust Fund (“HTF”), the fund from which Federal-aid funding to the States and funds for the IRR Program are paid. Senator Inhofe plainly stated that:

“The only way the bill will move forward is if it is fiscally responsible and does not add to the deficit. . . . [I]f for any reason the necessary funding isn’t secured [by Congress], I believe we would need to go back to the drawing board.”

Now that the EPW Committee has approved MAP-21, it must be combined with measures from the Senate Committee on Finance, Committee on Commerce, Science and

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Transportation, and Committee on Banking, Housing and Urban Affairs, and taken up by the full Senate. The Senate has not yet scheduled the bill for floor debate and, given the very crowded legislative calendar, whether there is time for the bill to come to the Senate floor is uncertain. If MAP-21 is passed by the Senate, it must still be considered by the House. As we have previously reported, the House currently is working on a six-year reauthorization, so support in the House for MAP-21's two-year authorization at current funding levels is uncertain. Congress extended SAFETEA-LU's authorization through March 31, 2012. Appropriations for SAFETEA-LU extend through November 18, 2011.

In Part II below, we summarize the major provisions of the MAP-21 as it was approved by the EPW Committee. In Part III, we discuss the rewrite of the funding formula for the IRR Program, and other provisions of MAP-21 that affect tribal transportation programs. As we note in Part III, we cannot assess the possible impacts of MAP-21's proposed funding formula on any one Indian tribe or BIA Region. Each Indian tribe will have to examine its existing IRR Program inventory and carefully consider the provisions of MAP-21 to determine how the proposed legislation, if enacted in its present form, may impact your tribe. We encourage you to correspond with your Congressional delegation and the key committees of Congress to express your views concerning the bill and to advocate for transportation improvements in Indian country.

II. MAP-21 Provisions

1. Funding Levels

MAP-21 reauthorizes the Federal-Aid Highway programs at the current funding levels, plus the cost of inflation, for two fiscal years. This level would be \$39.14 billion for FY 2012, and \$39.8 billion for FY 2013 with obligations for those years not exceeding \$41.56 billion and \$42.22 billion respectively. The Tribal Transportation Program ("TTP"), the new name for the Indian Reservations Road ("IRR") Program, would be funded at \$450 million for each fiscal year, maintaining the current funding levels without inflation, while the Federal Lands Transportation program would be funded at \$300 million for each fiscal year, with \$260 million of that amount to be reserved for the National Park Service and the United States Fish and Wildlife Service. The Transportation Infrastructure Finance and Innovation ("TIFIA") program would be funded at \$1 billion in each of the bill's two fiscal years, FY 2012 and FY 2013.

2. Authorizations of Reorganized Surface Transportation Programs

MAP-21 would consolidate the number of federal programs by two-thirds, from around 90 programs to less than 30, in an attempt to focus the limited Federal resources on key national goals and to reduce duplicative programs. The bill would continue to provide the majority of Federal-Aid Highway funds through core programs, but these programs have been reduced from seven to five. The Federal Lands and Tribal Transportation Highways Programs are a consolidation of the existing federal lands and tribal transportation programs. The bill would maintain current levels of funding for these two programs, although the TTP will include the former IRR Bridge and Tribal Safety Programs, which were previously paid outside the funding

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for the IRR Program. These programs are now take-downs from the base appropriation for the Tribal Transportation Program.

A. Federal-Aid Core Programs

(1) The National Highway Performance Program is a new core program that would consolidate the Interstate Maintenance, National Highway System (“NHS”), and Highway Bridge program. Many of the changes made to these programs in this new consolidation are meant to increase flexibility by eliminating barriers that exist between the programs.

The goals of the program are to ensure that investment of Federal-Aid funds are directed to achieve national performance goals for infrastructure condition and performance. To be eligible to receive funds under this program, a facility must be located on the NHS, and a project may only be eligible for this program if it supports progress toward national performance goals for improving infrastructure condition. This means the project must be for construction, reconstruction, resurfacing, rehabilitating or preservation of segments of the NHS of bridges or tunnels on the NHS; is for the construction, reconstruction, restoration, or rehabilitation of any federal-highway not on the NHS, and construction of a transit project if the project is in the same corridor as a fully access-controlled highway that is part of the NHS, and would enhance the level of surface on a highway that is part of the NHS; is for bicycle transportation and pedestrian walkways; or is for highway safety improvements.

(2) The Transportation Mobility Program is a new core program that would replace the current Surface Transportation Program, but retains the same structure and goals. Activities that previously received dedicated funding in SAFETEA-LU, but are being consolidated under this legislation, would be retained as eligible activities under the bill. Under MAP-21, capital costs for transit projects eligible for assistance under Chapter 53 of Title 49 would be eligible for this program, as well as projects associated with National Scenic Byways, America’s Byways programs and Safe Routes to School projects eligible for funding under SAFETEA-LU, 23 U.S.C. 402 note. However, Tribes are not eligible as direct recipients of funds under this program. From our review, the Tribal Scenic Byways Program is not continued under the bill.

(3) The National Freight Network Program is a new core program that would be a consolidation of existing programs into one that provides funds to the states by formula for project to improve regional and national freight movements on highways, including freight intermodal connectors.

(4) The Congestion Mitigation and Air Quality Improvement Program is an existing core program that provides funds for transportation projects designed to reduce traffic congestion and improve air quality. MAP-21 would amend the program to include particulate matter as one of the pollutants addressed and by requiring a performance plan in large metropolitan areas to ensure that this program’s funds are being used to improve air quality and congestion. The bill would also reform the Transportation Enhancements program, which sets aside Federal-Aid funds for projects to build pedestrian walkways and bike paths, by giving greater flexibility to the states concerning the use of program funds. Safe routes to school program projects are

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eligible for funding through this program. As under SAFETEA-LU, tribes are not eligible as direct recipients of funds under the Transportation Enhancements program.

(5) The Highway Safety Improvement Program is an existing core program. This bill would increase the amount of funding to build on the success of the Highway Safety Enhancement Program (“HSIP”). Although Indian tribes are not direct recipients of State HSIP funds, a number of Indian tribes and State Departments of Transportation are developing innovative ways to transfer HSIP funds to tribes for their use to improve road safety in Indian country.

B. The Transportation Infrastructure Finance and Innovation (“TIFIA”) Program

MAP-21 would continue to provide direct loans, loan guarantees, and lines of credit to surface transportation projects on favorable terms to leverage private and non-federal investment in transportation improvements. Included in Title III of MAP-21 and under the America Fast Forward Financing Innovation Act of 2011, this program is a favorite with the EPW Committee, and received a substantial increase in funding from SAFETEA-LU’s authorization of \$120 million. It also received a substantial increase in funding in the draft House transportation bill, and is broadly supported in both chambers of Congress.

In addition to increasing funding for the TIFIA Program, this bill modifies TIFIA by increasing the maximum share of projects costs from 33% to 49%, by allowing TIFIA to be used to support a related set of projects, and by setting aside 10% of all appropriated funds for projects in rural areas at more favorable terms.

As a “public authority” under 23 U.S.C. §101(a)(23), tribal governments are eligible to be direct recipients of funds under the TIFIA Program provided that a tribal project otherwise satisfies the program’s eligibility criteria. Direct eligible recipients include states, local governments, public authorities, public-private partnerships, or “any other legal entity undertaking the project authorized by the secretary,” provided that such entities have the authority to finance, build, operate or maintain toll or toll-free facilities. In the case of a project that is undertaken by an entity that is not a state or local government, the project must be publicly sponsored by being included in state transportation plans and programs.

To be eligible as a TIFIA project, a project would be required to have eligible project costs that are reasonably anticipated to equal or exceed the lesser of \$50 million (or \$25 million in the case of a rural infrastructure project), or 33 and 1/3% of the amount of federal highway assistance funds apportioned for the most recently completed fiscal year to the state in which the project is located.

C. The Projects of National and Regional Significance Program would be authorized to receive \$1 billion in FY 2013 to fund major projects of national and regional significance that meet certain criteria and eligibility requirements. Funds from this program would be used for projects that reduce congestion and its impacts, improve roadways vital to national energy security, and improve transportation safety. The purpose of the program is to fund critical high-

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cost surface transportation projects that are difficult to complete with existing public and private funds. The federal share of funds under this program would be up to 50% of the project cost, unless the project would be to construct or improve a privately owned facility or would primarily benefit a private entity. Other eligible federal transportation funds would be allowed to be used by the project sponsor up to an additional 30% of the project costs.

Tribal governments, consortia of tribal governments, state departments of transportation, transit agencies, port authorities, and metropolitan planning organizations would all be eligible for direct funding from this program. To be eligible for this program, a transportation project, or integrated projects, must 1) be a capital project or projects that are either eligible for transit funding under chapter 53 of title 49 or for surface infrastructure to facilitate intermodal interchange, transfer, and access into and out of intermodal facilities, and 2) has eligible project costs that are reasonably anticipated to be equal to or exceed the lesser of \$500 million for a project located in a single state, 60% of the amount of Federal-Aid Highway funds apportioned for the most recently completed fiscal year to the state; or for a project in more than one state, 75% of the amount of federal-aid highway funds apportioned for the most recently completed fiscal year to the state that has the largest apportionment.

A grant for a project under this program would be subject to the following requirements: 1) a qualifying highway project or public transportation project must comply with all applicable requirements of title 23 or chapter 53 of title 49, including the wage rate requirements of chapter 31 of title 40; 2) a qualifying highway project or public transportation project not eligible for funding under title 23 or chapter 53 of title 49 would still be required to satisfy the wage rate requirements of chapter 31 of title 40.

D. The Emergency Relief Program would continue to be authorized to receive up to \$100 million each fiscal year. This bill would make it clear that funds from this program may only be made if an emergency has been declared by the governor of the state with concurrence by the Secretary of Transportation, unless the President declares the emergency to be a major disaster for the purposes of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq.

Notwithstanding the requirements of a State disaster declaration or Presidential declaration of disaster, MAP-21 authorizes the Secretary of Transportation to expend funds from the emergency fund independently or in cooperation with any other branch of the federal government, a state agency, a tribal government, an organization or a person for the repair or reconstruction of tribal transportation facilities that are open to public travel, whether or not those facilities are Federal-Aid Highways. For the purposes of this provision, “open to public travel” means that the road is open to public for use with a standard passenger vehicle, without restrictive gates or prohibitive signs – other than traffic control restrictions based on size, weight, or class of registration. The bill would also authorize the Secretary to reimburse tribal governments and federal and state agencies for expenditures made for projects determined to be eligible for this program. MAP-21 does not include statutory amendments developed by Tribes and circulated for comment by the Senate Indian Affairs Committee in 2009 (“TRIP”) to

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streamline the emergency relief program to permit FHWA to make direct transfers of Emergency Relief for Federally Owned Roads (“ERFO”) funds.

E. Bridge inventory. The bill would require the Secretary of Transportation, in consultation with the Secretaries of appropriate Federal agencies, to inventory all Tribally-owned and federally-owned highway bridges that are open to the public, over waterways, other topographical barriers, other highways, and railroads. The Secretary would then be required to classify the bridges according to serviceability, safety, and essentiality for public use, and then assign each a risk-based priority for systematic preventative maintenance, replacement, or rehabilitation.

Under MAP-21, all bridges in the TTP inventory will be recorded in the national bridge inventory administered by the Secretary of Transportation under section 144 (of title 23 of the United States Code).

3. Performance Management

The bill would establish outcome-driven approaches to tracking performance to hold states and metropolitan planning organizations accountable for improving the conditions and performance of their transportation assets. The bill would require the Secretary to encourage each metropolitan planning organization to cooperate with tribal, federal, state and local officers and entities responsible for other types of planning activities that are affected by transportation, including planned growth, economic development, infrastructure services, and housing.

MAP-21 would also amend the statewide and metropolitan planning processes to incorporate comprehensive performance-based approaches. While developing Statewide Transportation Plans and Statewide Transportation Improvement Plans (“STIPs”), the bill would require the Secretary to encourage each state to cooperate with federal, tribal, state, and local officers and entities responsible for other types of planning that would be affected by transportation, such as planned growth, economic development, infrastructure services, and housing. In each area of a state under tribal jurisdiction, MAP-21 would continue to require that the statewide transportation plan and STIP would be developed in consultation with the tribal government and the Secretary of the Interior.

4. Acceleration of Project Delivery

MAP-21 would attempt to streamline and accelerate project delivery, by expanding contracting methods, creating dispute resolution procedures, allowing for early right-of-way acquisitions, reducing NEPA requirements for projects with no significant environmental impact, and encouraging early coordination between relevant agencies.

III. **MAP-21’s Tribal Transportation Program and Funding Formula**

As we initially reported MAP-21 includes a major reworking of the IRR Program funding formula. If MAP-21 is enacted, Indian tribes would receive their “Tribal shares” of

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transportation funding under a new formula beginning in FY 2013. FY 2012 would be a transition year in which 50% of every tribe’s “Tribal share” would be determined under the existing TTAM funding formula and 50% would be calculated under the new formula.

MAP-21 would strike sections 201 through 204 of title 23 of the United States Code, including TTAM’s Relative Needs Distribution Factor (“RNDF”) formula, and substitute new statutory text (in many cases reaffirming existing law). As for the formula for the IRR Program, however, the RNDF (50% Cost-to-Construct (“CTC”) + 30% Vehicle Miles Traveled (“VMT”) + 20% Population (“POP”) calculation) would be replaced, and the IRR High Priority Project (“IRRHPP”) Program and the Population Adjustment Factor (“PAF”) allocation would be eliminated.

Under MAP-21, the new allocation formula appears to place significant weight on each Tribe’s Native American Housing Assistance and Self-Determination Act (“NAHASDA”) American Indian/Alaska Native (“AI/AN”) population figure, which represents the AI/ANs who reside within each Tribe’s NAHASDA service area. We briefly summarize the existing TTAM formula before explaining MAP-21’s proposed new formula.

1. The IRR Program Tribal Transportation Allocation Methodology (TTAM)

The current funding formula for distributing IRR Program funds was developed by a joint Tribal-Federal Negotiated Rulemaking Committee authorized under TEA-21. The funding formula is set out in the Bureau of Indian Affairs’ (BIA) regulations for the IRR Program (see Subpart C of 25 C.F.R. Part 170), which took effect in FY 2005.

Under the TTAM funding formula, road inventory accounts for 80% of each Indian Tribe’s recurring “Tribal share” allocation (50% CTC + 30% VMT). And within the CTC and VMT calculations, ownership of the transportation facility also played a role in determining whether the CTC and VMT components would be counted at 100% (such as for BIA System and Tribally-owned transportation facilities) or counted at the lesser non-federal share percentage amount (a sliding scale percentage from 5% to 20% based on the State in which the Tribe is located). Tribal NAHASDA population figures count for 20% of a Tribe’s recurring TTAM share.

The current TTAM allocation formula is represented by the following mathematical equation:

$$\text{A Tribe's annual RNDF allocation} = \frac{(50\%) \times \text{Tribe's CTC}}{\text{Total CTC}} + \frac{(30\%) \times \text{Tribe's VMT}}{\text{Total VMT}} + \frac{(20\%) \times \text{Tribe's AI/AN POP}}{\text{Total AI/AN POP}}$$

Under the TTAM, a Tribe’s population figure does not correspond to Tribal enrollment numbers or to BIA Labor Force statistics. Population refers to the U.S. Decennial Census data of AI/ANs identified as residing within the Tribe’s NAHASDA service area, adjusted each year for births and deaths, which the Department of Housing and Urban Development (“HUD”) reflects in its annual allocation of Indian Housing Block Grant (“IHBG”) funds to tribes. In many

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instances, the NAHASDA AI/AN population figure reflected in the BIA's TTAM tables is less than an Indian tribe's actual enrollment.

As we illustrate in Table 1.0 below, after statutory and regulatory take-downs from the FY 2011 \$450 million appropriation for the IRR Program, the TTAM funding formula had approximately \$354.98 million for distribution to Indian tribes based on each Tribe's "Tribal shares" percentages (\$328.4 million in RNDF IRR Program construction funds, \$18.3 million in PAF funds, and \$8.3 million in 2% transportation planning funds). See row (k) in Table 1 below.

In addition to the RNDF, PAF and 2% planning funds, the TTAM funding formula sets aside an additional \$29.8 million for award to Tribes making application for their highest priority project (limited to Tribes receiving less than \$1.0 million in RNDF funding), or for emergency project funding (open to all Indian Tribes based on a first-come, first-serve basis). Combined, in FY 2011, the TTAM funding formula was able to distribute approximately \$385.0 million in IRR Program funds to tribes (85.5% of the entire \$450 million appropriation). See row (m) of Table 1.0.

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Table 1.0

FINAL FY 2011 TTAM Control Panel*		
(a)	Authorized and Appropriated Amount	\$450,000,000
(b)	Lake Tahoe MPO (23 USC 5303(f)(3))	\$ 2,250,000
	Subtotal	\$447,750,000
(c)	Obligation Limitation Deduction (7.4%)	\$ 33,133,500
	Subtotal	\$414,616,500
(d)	BIA 6% (PMO, PRAE, TTAP and CTIP)	\$ 27,000,000
(e)	Bridge Inspection	\$ 520,000
(f)	FLHP (inventory, travel, safety)	\$ 2,300,000
(g)	Subtotal	\$384,796,500
(h)	Available for RNDF	\$328,395,304
(i)	Available for PAF	\$ 18,302,286
(j)	Available for 2%	\$ 8,292,330
(k)	Subtotal	\$354,989,920
(l)	IRRHPP Program	\$ 29,806,580
(m)	Total	\$384,796,500 (85.51% of \$450 mil.)
* Data available on BIADOT's "FY2011 Final TTAM Control Panel" (June 13, 2011)		

2. MAP-21's Proposed Funding Formula

Under MAP-21, the IRR Program would be renamed the "Tribal Transportation Program" (TTP). We will therefore refer to "Tribal shares" of TTP funds rather than IRR Program shares to distinguish the two funding formulas. Just as the IRR Program funding formula has separate "pots" of funds to allocation among tribes, either by formula (such as the RNDF fund, PAF fund, and 2% planning funds) or by competitive applications (i.e., the IRRHPP Program), the TTP funding formula in MAP-21 also has major funding components ("eligible lane miles," NAHASDA population data, sliding scale population data) and a Tribal Supplemental Allocation. It appears that MAP-21 also makes the funds set aside for bridge and safety projects on a competitive basis.

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The new formula for the TTP may be roughly stated as follows:

20% (eligible lane mileage inventory) + 40% (NAHASDA pop. data) + 40% (sliding scale NAHASDA pop. data)

MAP-21's core 20/40/40 formula for the TTP is augmented by a "Tribal Supplemental Allocation" (a statutory take-down from the initial \$450 million appropriation). The primary purpose of the Tribal Supplemental Allocation is to off-set some of the impacts of the TTP funding formula by allocating these supplement funds among the BIA Regions prioritizing tribes whose "Tribal shares" have fallen below their FY 2011 allocation under the existing TTAM formula.

A. TTP Funding Formula's "Eligible Lane Mileage" Inventory (20%)

Like the IRR Program's TTAM funding formula, MAP-21 recognizes that Indian tribes may list a broad array of public roads in its road inventory, regardless of which public authority owns the transportation facility. Unlike the TTAM funding formula, however, MAP-21 would limit the type of public road that generate funding under the new TTP funding formula to three classes of transportation facilities; (1) facilities included in the "Bureau of Indian Affairs system inventory prior to October 1, 2004" (the "grandfathered routes")(i.e., those routes included in the IRR Program inventory prior to the effective date of the TTAM funding formula); (2) facilities owned by an Indian tribal government; and (3) facilities owned by the BIA.

Unlike the TTAM funding formula, which provides weighted averages for the Cost-to-Construct ("CTC") and Vehicle Miles Traveled ("VMT") components of an Indian tribe's IRR Program inventory, the funding formula proposed by MAP-21 gives weight to the type of road surface for lane miles otherwise eligible for inclusion in the 20% calculation. Paved roads and gravel surfaced roads eligible for inclusion in the MAP-21 funding formula (i.e., the grandfathered routes, BIA System and Tribally-owned routes only), are deemed equal to two lane miles per mile of inventory. Earth surfaced roads and unimproved roads are deemed to equal one lane mile per mile of inventory. Thus, if an Indian tribe has 200 miles of paved or gravel BIA System roads in its inventory, those routes would count as 400 miles under MAP-21's proposed formula for the 20% allocation of TTP funds.

State- and County-owned roads, regardless of surface type, do not count for funding purposes in the MAP-21 TTP formula, although MAP-21 continues to permit these "public roads" to be listed and included in an Indian tribe's inventory. MAP-21 expressly references the phrase "primary access routes" and "additional transportation facilities" that are eligible for funding so long as "such additional facilities are included in the inventory in a uniform and consistent manner nationally." This language was included in SAFETEA-LU.

The status of "proposed routes" is somewhat uncertain under MAP-21. MAP-21 calls for the Secretary of the Interior to develop regulations for the TTP using traditional Administrative Procedure Act (APA) notice and comment, subject to the Administration's Tribal consultation policies for the Department of Interior and Department of Transportation.

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A tribe’s 20% “eligible lane mileage” funding is calculated by determining each Indian tribe’s “eligible lane mileage” total and dividing it by the total “eligible lane mileage” for the entire TTP system. The fraction is then multiplied by the amount the TTP formula allocates for the 20% component, based on each year’s appropriations.

MAP-21 defines a “Tribal Transportation Facility” as a “public highway, road, bridge, trail or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory described in section 202(b)(1).” As we noted earlier, MAP-21 defines the phrase “open to the public” as meaning, with respect to a road, that “except during scheduled periods, extreme weather conditions, or emergencies, the road is open to the general public for use with a standard passenger vehicle, without restrictive gates or prohibitive signs or regulations, other than for general traffic control or restrictions based on size, weight, or class of registration.”

B. TTP Funding Formula’s first 40% NAHASDA Population Component

After the 20% allocation for “eligible lane mileage,” the TTP directs that 40% of available TTP funds, after statutory and regulatory take-downs have been made, will be distributed to Indian tribes in the ratio that the total population in each tribe (based on the NAHASDA AI/AN population) bears to the total population of all AI/ANs.

By way of example, if an Indian tribe has a NAHASDA AI/AN population of 7,500, it would receive a fractional amount of (0.00524) for its first 40% NAHASDA population allocation. The fraction is obtained by dividing the Tribe’s NAHASDA AI/AN population figure (7,500) into the total NAHASDA AI/AN figure for all tribes (1,430,769). The 1.43 million NAHASDA AI/AN population figure is derived from the Final FY 2011 TTAM Control Panel.

C. TTP Funding Formula’s Second 40% NAHASDA Population Component

Under MAP-21, the second 40% is divided equally among each BIA region for distribution of tribal shares as a sliding scale of AI/AN population amounts as follows (see Table 2.0 below).

Table 2.0

AI/AN NAHASDA POP.	Tribal Share of MAP-21’s 2 nd 40% Amt.
1 - 25	0.25%
26 - 100	0.75%
101 – 1,000	3.75%
1,001 – 10,000	20.0%
10,001 – 60,000* (Region must have at least 3 or more tribes at this pop. level; if not the 3 or fewer tribes split the 20.0% share amount)	74.75%
60,001 or greater	0.5%

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MAP-21 requires that for any BIA Region that has no Indian tribes meeting the population criteria tier identified in Table 2.0, the Region must redistribute any funds among the funding categories that do have Indian tribes proportionally in accordance with the percentages until such funds are completely distributed. We therefore interpret MAP-21 to require that the distribution of the second 40% NAHASDA population funding amount remain in the BIA Region until the funds have been fully distributed among the Region's tribes in proportion to the appropriate percentages in each population tier.

D. TTP Funding Formula's "Tribal Supplemental Allocation" Fund

As we have noted above, MAP-21's funding formula of 20/40/40 is supplemented by an additional allocation of TTP funds which we believe is intended to bring an Indian tribe's TTP allocation up to, but not exceed, its FY 2011 TTAM "Tribal share" amount. Under MAP-21, the Secretary of Transportation is required to set aside 10% of the first \$275 million appropriated for the TTP, and 12.5% of the amount in excess of \$275 million. If Congress appropriates \$450 million for the TTP Program, and assuming that the BIA funds the Tribal Supplemental Allocation fund after, rather than prior to making statutory and regulatory take-downs, as the BIA does currently for the IRRHPP Program, the Tribal Supplemental Allocation amount, by our estimate would total around \$41.83 million for FY 2013.

MAP-21's Tribal Supplemental Allocation is not divided equally among the 12 BIA Regions. As proposed under MAP-21, the Secretary of Transportation will distribute to each BIA Region a share of the supplemental funds in proportion to the regional total of tribal shares based on the cumulative tribal shares of all Indian tribes within the Region based on the 20/40/40 TTP funding formula. MAP-21 requires the Secretary of Transportation to calculate which tribes in the region received less funding under the new TTP formula than under the current TTAM funding formula for the IRR Program and, allocate to such tribes a share of the Tribal supplemental funds.

Under MAP-21, an Indian tribe may not receive more funds under the new TTP formula than it would be entitled to receive in FY 2011 under the TTAM funding formula by reason of the Tribal supplemental funding category. This acts as a ceiling to ensure that an Indian tribe receiving less under the new TTP formula in any given fiscal year cannot receive more than it had received in FY 2011 under the TTAM formula. From what we can discern, the supplemental funds remain within the Region until fully distributed. The Supplemental Allocation is a complicated formula and one the BIA may find difficult to implement.

Unless the BIA carries out a trial run of the new formula, based on existing road inventories and Tribal NAHASDA population data, it is mere guesswork how any one Indian tribe would fare under the TTP formula. This is especially the case since the Tribal Supplemental Allocation fund may bring a tribe up to its FY 2011 TTAM funding amount. According to BIADOT Division Chief LeRoy Gishi, however, the BIA does not plan to generate a trial run of how TTP funds would be allocated among Indian tribes and BIA Regions.

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3. MAP-21's Other Statutory Changes to the TTP Program

In addition to the rewrite of the funding formula for the IRR Program, MAP-21 reauthorizes many provisions originally included in SAFETEA-LU. If enacted, MAP-21 would:

- (1) Reaffirm existing contract authority – Gives discretion to the Secretary of Transportation and the Secretary of the Interior to enter into a contract “or other appropriate agreement” with Indian tribes, States and subdivisions of States concerning the activities of the Tribal Transportation Program.
- (2) Employment of Indian Labor – Reauthorize the use of Indian labor to carry out any construction or other activity authorized for the Tribal Transportation Program in accordance with such rules and regulations as the Secretary of the Interior may issue.
- (3) TTAPs- Reauthorize the Secretary of the Interior funding of Tribal Technical Assistance Centers.
- (4) Road Maintenance – Amends existing statutory authority to grant greater discretion to the Secretary of the Interior and Indian tribes to use the greater of 25% of an Indian tribe's Tribal Transportation Program (TTP) allocation, or \$500,000 for the purpose of maintenance (excluding road sealing projects, which will not be subject to any limit on spending); and reaffirms that it remains the BIA's “primary responsibility,” including annual funding request responsibility, to provide road maintenance programs on Indian reservations.
- (5) Reaffirms Tribe-State Road Maintenance Agreements – Continues to permit tribes and states to enter into road maintenance agreements permitting tribes to assume the responsibility of the state for tribal transportation facilities and roads providing access to tribal transportation facilities, without the approval of the Secretary of Transportation.
- (6) Competitive Bidding and Indian Preference Laws – Generally requires construction projects to be performed by contract awarded by competitive bidding, but recognizes that a different method is permissible when the Secretary of Transportation or Secretary of the Interior find a different method to be in the public interest. MAP-21, however, expressly recognizes that, notwithstanding the requirements for competitive bidding in construction, section 7(b) of the Indian Self-Determination and Education Assistance Act (Indian preference in hiring and training and preference in the award of subcontracts to Indian-owned economic enterprises), and 25 U.S.C. 47 (employment of Indian labor so far as practicable) apply to all funds administered by the Secretary of the Interior that are appropriated for construction and improvement of tribal transportation facilities.
- (7) National Tribal Transportation Facility Inventory – Requires the Secretary of the Interior, in cooperation with the Secretary of Transportation, to maintain a

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- comprehensive national inventory of tribal transportation facilities eligible for assistance under the TTP. Reaffirms SAFETEA-LU's listing of eligible transportation facilities (e.g., "grandfathered routes" (included in the IRR Program inventory prior to October 1, 2004), BIA System routes, tribally-owned routes, routes built or rebuilt with HTF dollars since 1983, primary access routes, etc.).
- (8) Reaffirms SAFETEA-LU's 30-day Transfers to Tribes – Requires the Secretary of the Interior to distribute TTP funds to Indian tribes for their immediate use, not later than 40 days after the date on which TTP funds are made available to the Secretary of the Interior.
 - (9) Reaffirms SAFETEA-LU's Tribal PS&E Approval Authority - Permits an Indian tribe to approve plans, specifications and estimates and begin construction, provided that the Indian tribe provides a health and safety assurance certification, obtains the advance review of the plans and specifications by a State-licensed civil engineer, and provides the certification to the Deputy Assistant Secretary for Tribal Government Affairs (USDOT), or the Assistant Secretary for Indian Affairs (DOI), as appropriate.
 - (10) Reaffirms Direct Agreements with FHWA – Reauthorizes the statutory authority under SAFETEA-LU that permits Indian tribes to contract directly with the FHWA to assume all contractible functions and duties of the Secretary of the Interior for the IRR Program.

As we previously reported, the exact language of some of these provisions is occasionally problematic, but the basic intent of these sections appears to be consistent with the requests that tribes have made through the NCAI-ITA Transportation Task Force.

4. Other MAP-21 Amendments which Impact the TTP Program

In addition to the above noted changes, MAP-21 also restructures the Federal lands and tribal transportation programs in a manner similar to the streamlining and consolidation it would bring to the core programs of the U.S. Department of Transportation. MAP-21:

- (1) Develops uniform policies – Requires the Secretary of Transportation, in collaboration with the Secretaries of the appropriate federal land management agencies, to coordinate a uniform policy for all public Federal and tribal transportation facilities that will apply to Federal lands transportation facilities, tribal transportation facilities, and Federal lands access transportation facilities.
- (2) Reaffirms Federal Share – The Federal share of the cost of a project carried out under the Federal lands transportation program or the tribal transportation program is 100%.
- (3) Transportation Planning – Requires the Secretary of Transportation, in consultation with the Secretary of each appropriate Federal land management agency, to implement transportation planning procedures for Federal lands and tribal transportation facilities

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that are consistent with the planning processes required under sections 134 (Metropolitan transportation planning) and 135 (Statewide transportation planning) of title 23. The Secretary of Transportation shall continue to approve transportation improvement programs (TIP).

- (4) Regionally Significant Transportation Programs – Requires that regionally significant tribal, federal lands and federal lands access programs must be developed in cooperation with State and metropolitan planning organizations, and included in appropriate tribal, federal lands, and federal lands access transportation program plans, State and metropolitan plans, and transportation improvement programs.
- (5) Asset Management – Requires the Department of Transportation and Department of the Interior, to the extent appropriate, to implement safety, bridge, pavement, and congestion management systems for facilities funded under the tribal transportation program and federal lands transportation program in support of asset management. MAP-21 defines “asset management” to mean a “strategic and systematic process of operating, maintaining and improving physical assets . . . to identify a structured sequence of maintenance, repair, rehabilitation, and replacement actions that will achieve and sustain a desired state of good repair over the lifecycle of the assets at minimum practicable cost.”
- (6) Data Collection – Directs the Secretary of Transportation and appropriate Federal land management agency head to collect and report data necessary to implement the tribal transportation program, including inventory and condition information on tribal transportation facilities, bridge inspection and inventory information, and collection and reporting data standards.

IV. Conclusion

As we stated earlier, the Senate has yet to schedule time to debate MAP-21 on the Senate floor. Because of the \$12 billion shortfall that the bill creates in the Highway Trust Fund and Congress’s desire to not dip into the General Fund to fund transportation programs, it is unclear whether this bill will have enough support to pass the Senate unless the Senate Finance Committee can locate additional revenue to cover the projected shortfall in HTF monies.

Even if it passes the Senate, MAP-21 faces a hard road in the House, where the Chairman of the Transportation and Infrastructure Committee, Congressman John Mica (R-FL), has expressed his desire for a long-term, six-year, fiscally-responsible reauthorization, that is funded based on projected receipts to the HTF. Earlier this year, Chairman Mica had suggested funding for a six-year reauthorization highway bill would be in the range of \$230 billion for highway, transit and safety programs.

However, as this bill moves through Congress, it is important for Tribes to continue discussions with their delegations to ensure the needs of Indian country are known and that Tribes have full access to important transportation programs as direct eligible recipients.

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We will continue to keep you updated on the movement of this bill as it works its way through Congress.

Respectfully Submitted,

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