

DEPARTMENT OF TRANSPORTATION
TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM
NEGOTIATED RULEMAKING COMMITTEE
TRIBAL REPRESENTATIVES

January 12, 2018

The Honorable Anthony R. Bedell
Deputy Assistant Secretary for Intergovernmental and Tribal Affairs
United States Department of Transportation
West Building, W85-316
1200 New Jersey Avenue, SE
Washington, D.C. 20590-9898

Re: Tribal Transportation Self-Governance Negotiated Rulemaking Process

Dear Deputy Assistant Secretary Bedell:

Thank you for attending and participating in the January 8-12, 2018 meeting of the Department of Transportation's Tribal Transportation Self-Governance Negotiated Rulemaking Committee in Sterling, Virginia, the first meeting of the Committee under the Trump Administration. Your personal attendance, on behalf of Secretary Elaine L. Chao, attests to the commitment of the Secretary and the Administration to the government-to-government relationship between the United States and the Tribal nations. We are also appreciative of your inviting General Counsel Steven Bradbury to address the Rulemaking Committee. His interest in this rulemaking process is greatly appreciated as is his commitment to work collaboratively with the Committee to honor the statutory timeframes for publication of a draft consensus rule (Notice of Proposed Rulemaking (NPRM)) by March 3, 2018 and a final rule by December 1, 2018, the extended deadlines as authorized under section 207 of the FAST Act.

We write with regard to the content of the proposed rule, the statutory time frames for publication of the NPRM, and the Committee protocols which were drafted and adopted at the very first work session, that govern our work and work product. The Committee was established in August 2016 and met on five occasions during 2016 to develop a proposed rule to extend the Tribal Self-Governance Program to the Department and all its modal administrations. In Section 1121 of the FAST Act, Congress directed the Department 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." 23 U.S.C. 207(n)(2)(C). The protocols reflect our strong desire that the Office of the Secretary, the Office of General Counsel, and the Office of Management and Budget honor the work product of the Committee unless contrary to statute, as the draft represents decades of self-governance experience and hundreds of hours of effort, and thoughtful deliberation and compromise. These regulations should be clear and easy to understand to minimize uncertainty and the possibility of litigation. The Tribal

representatives wish to be clear; a condensed NPRM, a program handbook, or departmental guidance are all unacceptable alternatives to comprehensive regulatory language implementing legislation enacted for the benefit of tribes.

The joint Tribal-Federal Committee made a great deal of progress over the five months we met. The 13-month break in the work of the Rulemaking Committee, from December 2016 to January 2018, forces us all to work quickly and in good faith to complete our respective components of the NPRM; namely, the preamble, the draft rule, and the regulatory impact analysis. But in doing so, we must acknowledge and honor the protocols which were negotiated and accepted by the Committee, Federal partners, and the Designated Federal Official (DFO).

The first proposed regulatory provision in the draft rule we reviewed this week, section 663.1 (Authority, purpose and scope), states that the regulations are “prepared, issued and maintained with the active participation and representation of Tribes and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by 23 U.S.C. 207(n).” This provision will only be true, however, if we, the Tribal representatives, are afforded the opportunity by the Department to review changes the Department and the Office of Management and Budget (OMB) may make to the draft rule during the agency vetting process after this week and prior to publication of the NPRM in the Federal Register.

We therefore greatly appreciate your commitment to convene additional meetings of the Negotiated Rulemaking Committee after January 12, 2018, to ensure that the Tribal representatives to the Rulemaking Committee remain integral to this process and are provided changes in the NPRM made by the Office of the Secretary (OST) and OMB, and to negotiate further revisions if necessary. In order to realize the goal of a final rule acceptable to tribes, we believe that an additional face-to-face meeting of the Committee must be convened prior to the publication of the NPRM to review the Department’s final draft. If the Department declines to make further changes to the NPRM in response to our request, we ask the Secretary recognize our right to note and outline our disagreements within the preamble to the NPRM prior to submittal and publication in the Federal Register. Articles IV.B and V.A of the Committee’s protocols reflect our mutual agreement to such review and comment by the Tribal representatives to the Committee.

Like the Department officials involved in the rulemaking, we have obligations to our respective Tribes and Regions to report on the content of the draft rule and the nature of our exchanges and interactions with Department officials as we work toward a consensus rule reflecting our mutual obligations and responsibilities under the Self-Governance Program. It is in this same representative role that Tribal committee members seek a rule that provides clarity to Tribes and other transportation officials, comports with the way Tribes carry out Self-Governance, and avoids the problems of the past that have already been remedied through prior negotiation and existing regulations. We believe you share our goal of producing a rule that is both beneficial to users of the rule and that furthers the goals of Self-Governance.

We appreciate the professionalism and dedication in how you, General Counsel Bradbury, and your respective staff are approaching the Negotiated Rulemaking process. The extension of the Tribal Self-Governance Program to the Department of Transportation presents a unique opportunity to streamline and improve the delivery of transportation programs and services to American Indian and Alaska Native citizens and further empower the Tribal Nations which promotes the inherent right for Sovereign Nations to self-govern.

We look forward to continuing our work toward reaching consensus on draft language for a useful rule in good faith and mutual respect.

Sincerely,



Kay Rhoads, Tribal Co-Chair
Principal Chief, Sac and Fox Nation



Joe A. Garcia, Tribal Co-Chair
Head Councilman, Ohkay Owingeh

cc: General Counsel Steven Bradbury
DFO Erin Kenley, FLH, FHWA
Assistant Chief Counsel, FHWA, Vivian Philbin
W. Ron Allen, Tribal Self-Governance Advisory Committee