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[4910-22-P]

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 661

[FHWA Docket No. FHWA-2019-0039]

RIN 2125-AF91

Tribal Transportation Facility Bridge Program

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This proposed rule would update the existing Tribal Transportation Program Bridge Program, formerly known as the Indian Reservation Road (IRR) Bridge Program, by renaming it the Tribal Transportation Facility Bridge Program (TTFBP) to comply with the changes made in the Moving Ahead for Progress in the 21st Century Act (MAP-21), carried on through the Fixing America's Surface Transportation (FAST) Act, and the recent changes made by the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA). It would also remove references to terms such as structurally deficient, functionally obsolete, and sufficiency rating. These updates would align the TTFBP terminology for bridge conditions with the terminology used for State departments of transportation (State DOT) in the Federal-aid highway program. This change would establish a consistent terminology for classifying and referring to bridge conditions.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, the FHWA will hold four public information, education, and consultation meetings during the public comment period to explain the rule, answer questions, and take oral testimony. While a court reporter will document these meetings, attendees are encouraged to submit written public comments. Three meetings will be held in or near Indian country at the locations listed below and a fourth meeting will be held virtually. Additional information on the meetings may be found at https://highways.dot.gov/federal-lands/programs-tribal/bridge. FHWA will hold meetings on the following dates and locations:

1. April 4th, 2023, 2-3 p.m. EST, Virtual Listening Session by Webinar, https://highways.dot.gov/federal-lands/programs-tribal/webinars; Telephone: +1 551 285 1373; Meeting ID: 161 207 5615; Passcode: 042703.

2. April 20th, 2023, 9–11 a.m. MDT, Department of the Interior University, National Indian Programs Training Center, Albuquerque, NM.

3. May 17th, 2023, 9 - 11 a.m. CST, Great Northern Jerome Hill Theater, St. Paul, MN.

4. May 18th, 2023, 2 – 4 p.m. PDT, Northwest Region Transportation Symposium, Northern Quest Resort and Casino, Airway Heights, WA.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- Federal eRulemaking Portal: Go to *www.regulations.gov* and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor Room W12-140, Washington, D.C. 20590;
- Hand Delivery: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave., SE., Washington, D.C. 20590, between 9 a.m. 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329;

- Instructions: You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to *www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Russell Garcia, P.E., Federal Lands Highway/Office of Tribal Transportation, Russell.Garcia@dot.gov, (703) 404-6223, or Michelle Andotra, Office of the Chief Counsel, Michelle.Andotra@dot.gov, (404) 562-3679, Federal Highway Administration, 60 Forsyth Street, SW, Suite 8M5, Atlanta, GA 30303.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at www.regulations.gov using the docket number listed above. Electronic retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's Web site at: www.federalregister.gov and the Government Publishing Office's Web site at: www.GovInfo.gov.

Background

Legal Authority

This regulatory action is necessary to update 23 CFR part 661 to reflect the changes made to the program since the last regulatory update in 2008. These changes are largely nomenclature changes to the existing regulation that FHWA has been implementing under 23 U.S.C. 202(d), and do not substantively change the TTFBP. Importantly, this proposed rule would align the TTFBP terminology for bridge conditions with the terminology used in the Federal-aid highway program for State DOTs. This

change would establish a consistent terminology for classifying and referring to bridge conditions. In addition, this proposed rule would update the name of the program to TTFBP in every place where it formally appeared. Other proposed non-substantive changes to each section are outlined in the section-by-section discussion below.

Section-by-Section Discussion of the Proposed Amendments – (This discussion references the existing regulation, including prior nomenclature).

§ 661.3 Who must comply with this regulation?

The regulation applies to all Tribal Transportation Facility (TTF) bridges. FHWA proposes to delete the structurally deficient and functionally obsolete language to align the TTFBP terminology for bridge conditions with the terminology used for State DOTs in the Federal-aid highway program. The remaining terminology used in this section is consistent with 23 CFR part 490, Subpart D, National Performance Management Measures for Assessing Bridge Condition. Thus, this change would establish a consistent terminology for classifying and referring to bridge conditions. Also, FHWA proposes to delete the term "Public Authorities" and replace it with the term "Tribes and Tribal Consortiums," as the eligible applicants under this program and covered by this regulation.

§ 661.5 What definitions apply to this regulation?

FHWA proposes to delete the following definitions: functionally obsolete, Indian Reservation Road (IRR), IRR bridge, life cycle cost analysis, Public Authority, structurally deficient, structure inventory and appraisal sheet, and sufficiency rating because these terms are no longer used in this regulation. Also, FHWA proposes to add the definitions of National Bridge Inventory (NBI), National Tribal Transportation Facility Inventory (NTTFI), operating rating, rehabilitation, replacement, Tribal Transportation Facility (TTF), and TTF bridge because this regulation uses these terms as qualifiers for projects.

§ 661.9 What is the total funding available for the IRRBP?

FHWA proposes to replace the specific funding amounts with a more generalized statement due to the complex nature of the funding for the TTFBP. The TTFBP Web site, www.highways.dot.gov/federal-lands/programs-tribal/bridge will provide additional information as the funds are made available.

§ 661.15 What are the eligible activities for IRRBP funds?

To provide a consistent means of classifying and referring to bridge conditions between the TTFBP and 23 CFR part 490, Subpart D, FHWA proposes to delete the phrases "structurally deficient" and "functionally obsolete" and substitute "are in poor condition, have low load capacity, or need highway geometric improvements" to align the TTFBP terminology for bridge conditions with the terminology used for State DOTs in the Federal-aid highway program. The remaining terminology used in this section is consistent with 23 CFR part 490, Subpart D. Thus, this change would establish a terminology for classifying and referring to bridge conditions. Also, FHWA proposes to incorporate the eligibility requirements of 23 U.S.C. 202(d), as amended by BIL.

§ 661.17 What are the criteria for bridge eligibility?

This section would delete the requirement for bridges to "be located on an IRR that is included in the IRR Inventory" to be consistent with the new Tribal Transportation Program (TTP) terminology used with 25 CFR part 170. To provide a consistent means of classifying and referring to bridge conditions, FHWA also proposes to delete the "structurally deficient" and "functionally obsolete" criterion and substitute a condition criterion that the bridge "be classified as in poor condition." This would align the TTFBP terminology for bridge conditions with the terminology used for State DOTs in the Federal-aid highway program. The remaining terminology in this section is consistent with 23 CFR part 490, Subpart D. Thus, this change would establish a consistent terminology for classifying and referring to bridge conditions. FHWA also proposes to

add the "low load capacity" and "need highway geometric improvements" criteria, which would apply to bridges that are "classified in poor condition, have a low load capacity, or need highway geometric improvements," in lieu of the "structurally deficient or functionally obsolete" classification set forth in paragraph 23 CFR 661.17(a)(3) of the existing regulations. FHWA also proposes to clarify the new criteria for bridge eligibility for new bridge construction. While the BIL adds eligibility for new bridge construction at 23 U.S.C. 202(d)(2)(A), the amendments at 23 U.S.C. 202(d)(1) and (3) also require bridges to be classified in poor condition, have a low load capacity, or needing geometric improvements. Since new bridges do not have a condition classification, a load capacity, or a need for geometric improvements, FHWA proposes to clarify that projects for new bridge construction do not need to meet this criterion. Further, FHWA proposes to delete paragraph (b) in the existing section, as the 10-year rule for bridge replacement or rehabilitation is now obsolete in the Federal-aid highway program.

§ 661.19 When is a bridge eligible for replacement?

The funding eligibility criteria set forth in 23 U.S.C. 202(d)(3), requires that a bridge: (A) have an opening of not less than 20 feet; (B) be classified as a tribal transportation facility; and (C) be structurally deficient or functionally obsolete. For consistency with the terminology used in 23 CFR part 490, Subpart D, FHWA proposes to interpret the eligibility requirements for replacement under 23 U.S.C. 202(d)(3)(C) to mean that a bridge must be in poor condition, have low load capacity, or need highway geometric improvements. The proposed regulatory text reflects this interpretation. The "poor condition" classification would be consistent with 23 CFR part 490, Subpart D. The new "low load capacity" and "need highway geometric improvements" criteria would align with the "functionally obsolete" classification in the existing regulations.

§ 661.21 When is a bridge eligible for rehabilitation?

The eligibility criteria in 23 U.S.C. 202(d)(3) provide, as set forth above, that bridges must be either structurally deficient or functionally obsolete to be eligible to receive funding. However, for consistency with the terminology used in 23 CFR part 490 Subpart D, FHWA proposes to interpret the eligibility requirements for rehabilitation under 23 U.S.C. 202(d)(3)(C) to mean that a bridge must be in poor or fair condition, have low load capacity, or need highway geometric improvements. FHWA proposes regulatory text consistent with this interpretation. The poor or fair condition criterion is a classification consistent with 23 CFR part 490, Subpart D. The new "low load capacity" and "need highway geometric improvements" criteria would align with the "functionally obsolete" classification in the existing regulations.

§ 661.23 How will a bridge project be programmed for funding once eligibility has been determined?

The eligibility criteria set forth in 23 U.S.C. 202(d)(3) provide, among other things, that bridges must be either structurally deficient or functionally obsolete to receive funding. However, consistent with the terminology used in 23 CFR part 490, Subpart D, FHWA proposes to substitute the bridge sufficiency rating criterion and the bridge status criterion of "structurally deficient" and "functionally obsolete" with a condition rating of "good," "fair," or "poor." FHWA proposes to use these condition ratings as the criteria for ranking and prioritizing the bridge projects in the queue for funding, together with the existing criteria set forth in 23 CFR 661.23(b)(3) – (6).

In the proposed paragraph (a), FHWA refers to "non-BIA/non-tribally owned" instead of "non-BIA owned." In the proposed paragraph (b)(2), FHWA replaces the existing criteria language with "Low load capacity bridges based on Operating Rating." In paragraphs (b)(5) and (b)(6), FHWA proposes to change the criteria based on an annual average so that they would refer to annual average daily traffic and annual truck daily traffic, respectively. These changes are consistent with the National Bridge

Inventory (NBI). Also, FHWA proposes to define the criteria for rating a bridge as being in poor, fair, and good condition, consistent with 23 CFR part 490, Subpart D. These criteria are proposed to be included in a new paragraph (d).

§ 661.25 What does a complete application package for Preliminary Engineering consist of and how does the project receive funding?

FHWA proposes to reorganize this provision. Proposed paragraph (a) would list the elements of a complete application package for preliminary engineering (PE) in numbered subparagraphs (a)(1)-(6), including two proposed changes. In subparagraph (a)(5), FHWA proposes to replace the existing Structure Inventory and Appraisal (SI&A) requirement with a requirement for National Bridge Inventory (NBI) data, which shows the condition rating of the bridge. In subparagraph (a)(6), FHWA proposes to add a requirement for an acknowledgment by the Tribe of the project specific funding requirements and that any excess funds would be returned to FHWA for further distribution. This statement is consistent with the existing and proposed 23 CFR 661.41.

Proposed paragraph (b) would be unchanged except that it would refer to "non-BIA/non-tribally owned TTF bridges" instead of "non-BIA IRR bridges." FHWA proposes to split the two statements in existing paragraph (c) to clarify in proposed paragraphs (c) and (d) that both items are necessary for a complete application. Lastly, FHWA proposes to redesignate existing paragraph (d) as paragraph (e) and to replace the reference to "an FHWA/Tribal agreement" with a reference to "a TTP Program Agreement between FHWA and a Tribal Government or Consortium."

§ 661.27 What does a complete application package for construction consist of and how does the project receive funding?

FHWA proposes to reorganize this provision. Proposed paragraph (a) would list the elements of a complete application package for construction in numbered subparagraphs, including the following proposed changes. In subparagraph (a)(3),

FHWA proposes to replace the existing SI&A sheet requirement with a requirement for NBI data. FHWA proposes to relocate to subparagraph (a)(5) the provision that all environmental and archeological clearances and complete grants of public rights-of-way must be acquired prior to submittal of the construction application package. FHWA also proposes to add subparagraph (a)(6), which would require that a complete application package for construction include an acknowledgment by the Tribe of the project specific funding requirements and that any excess funds will be returned to FHWA for further distribution. This statement is consistent with the existing and proposed 23 CFR 661.41.

In addition, FHWA proposes to move the additional application package requirements from existing paragraph (a) to a new paragraph (b) and refer to "non-BIA/non-tribally owned TTF bridges" instead of "non-BIA IRR bridges." FHWA proposes to split the two statements in existing paragraph (b) into proposed paragraphs (c) and (d) to clarify that both items are necessary for a complete application. In proposed paragraph (d), FHWA refers to "TTF bridge projects" instead of "IRRBP projects." Finally, FHWA proposes to move existing paragraph (c) to a new paragraph (e) and replace the reference to "an FHWA/Tribal agreement" with a reference to "Tribes, under a TTP Program Agreement between FHWA and a Tribal Government or Consortium, or the Secretary of the Interior upon availability of program funding at FHWA."

§ 661.29 How does ownership impact project selection?

FHWA proposes to refer "non-BIA/non-tribally owned TTF bridges" instead of "non-BIA owned IRR bridges." Also, FHWA proposes to modify the first sentence of the section to remove language regarding "trust responsibilities," as this section pertains to priority of project selection.

§ 661.31 Do IRRBP projects have to be listed on an approved IRR TIP?

FHWA proposes to refer to "FHWA TTP TIP" instead of "TTP TIP." Also, FHWA proposes to add a statement that TTF bridge projects included in the TTP TIP that are not fiscally constrained may still be included as a list of projects dependent upon the availability of additional resources also known as an "illustrative list."

§ 661.35 What percentage of IRRBP funding is available for use on BIA and Tribally owned IRR bridges, and non-BIA owned IRR bridges?

FHWA proposes to refer "non-BIA/non-tribally owned TTF bridges" instead of "non-BIA owned IRR bridges."

§ 661.37 What are the funding limitations on individual IRRBP projects?

FHWA is considering an adjustment to the funding limits for PE in paragraph (a) and for PE and construction in paragraph (b). The existing funding limits established by the 2008 final rule have not kept pace with increased costs in the last 15 years and adjustment may be necessary to allow increased flexibility. FHWA specifically requests comments on whether these amounts should be adjusted, the extent of any needed adjustment, and the experience of stakeholders in navigating these funding limitations. Data justifying commenter recommendations is specifically requested.

§ 661.45 What happens when IRRBP funds cannot be obligated by the end of the fiscal year?

FHWA proposes to add "from the Highway Trust Fund" as the funds described in this section subject to August Redistribution for any unobligated funds.

§ 661.47 Can bridge maintenance be performed with IRRBP funds?

The existing regulation cites a number of maintenance activities as examples of ineligible uses of IRRBP funds. FHWA proposes to add the modifier "routine" to bridge maintenance repairs on this list of ineligible uses of TTFBP funds.

§ 661.49 Can IRR Bridge Program funds be spent on Interstate, State Highway, and Toll Road IRR bridges?

FHWA proposes to add County, City, and Township TTF bridges as eligible for funding under the TTFBP if those bridges are eligible Tribal transportation facilities.

§ 661.53 What standards should be used for bridge design?

In paragraph (a), FHWA proposes to add "New" for the design standards to be used for new bridges.

§ 661.55 How are BIA and Tribal owned IRR bridges inspected?

FHWA proposes to add "in-service" to refer the inspection to in-service TTF bridges. Also, FHWA proposes to change the section references to the BIA regulations codified at 25 CFR part 170 pertaining to in-service TTF bridge inspections, because the sections referenced in our existing regulations no longer exist and have been renumbered. The outdated section references FHWA proposes to remove are 25 CFR 170.504-170.507. The new section references FHWA proposes to include are 25 CFR 170.513-170.514. *See* BIA, Tribal Transportation Program Final Rule, 81 FR 78456 (Nov. 7, 2016). This is an administrative update and not a change to the requirements to bridge inspections.

§ 661.57 How is a list of deficient bridges to be generated?

FHWA proposes to delete this section because it is not relevant to the purpose of this regulation as stated in § 661.1, to prescribe policies for project selection and fund allocation procedures for administering the TTFBP.

§ 661.59 What should be done with a deficient BIA owned IRR bridge if the Indian Tribe does not support the project?

FHWA proposes to reference 25 CFR 170.114(a)(1) which generally sets forth health and safety restrictions. Also, because of the elimination of § 661.57 of the existing regulation, FHWA proposes to change this section number from § 661.59 to § 661.57.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after the close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Rulemaking Policies and Procedures

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order (E.O.) 12866. Accordingly, OMB has not reviewed it. This action complies with E.O.s 12866 and 13563 to improve regulation. It is anticipated that the economic impact of this rulemaking would be minimal and that the benefits would outweigh the costs. The proposed changes are largely administrative and are expected to provide clarification of the existing regulations, including by removing outdated references. While it is not possible to quantify potential costs and benefits, FHWA expects that by making the terminology used in the TTFBP regulations consistent with that used in the Federal-aid highway program, the proposed changes will reduce confusion and facilitate implementation of the TTFBP. The proposed changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this proposed action on small entities and has determined that the proposed action would not have a significant economic impact on a substantial number of small entities. This proposed action would amend the existing regulations pursuant to Section 1119 of MAP-21, Section 1118 of the FAST Act, and Sections 11118, 14004, and Division J of the BIL, and would not fundamentally alter the funding available for the replacement or rehabilitation of TTF bridges in poor condition. For these reasons, FHWA certifies that this action would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $155 million or more in any one year (2 U.S.C. 1532). In addition, the definition of "Federal mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility. Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, Tribal governments, and the private sector.

Executive Order 13132 (Federalism Assessment)

FHWA has analyzed this NPRM in accordance with the principles and criteria contained in E.O. 13132. FHWA has determined that this action would not have

sufficient federalism implications to warrant the preparation of a federalism assessment. FHWA has also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal Agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FHWA has determined that this action does not contain collection of information requirements for the purposes of the PRA.

National Environmental Policy Act

FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and has determined that this action would not have a significant effect on the quality of the environment and qualifies for the categorical exclusion at 23 CFR 771.117(c)(20).

Executive Order 13175 (Tribal Consultation)

This NPRM is largely technical and non-substantive. However, FHWA and BIA met with approximately 80 federally recognized Tribes at the National Transportation in Indian Country Conference (NTICC) in Big Sky, Montana, on September 18, 2019, and at the BIA Providers Conference in Anchorage, Alaska, on December 4, 2019, to advise and receive input on this proposed rule in the TTFBP regulations.

As an update to the NPRM to include the BIL revisions, several appropriate meetings and consultations with the Tribal Governments were held again in 2022 about the TTFBP and the NPRM. The following meetings with the Tribes were held:

1. Inter Tribal Council of Arizona Virtual Meeting, March 10, 2022.
2. BIA Alaska Provider's Conference Virtual Meeting, April 6, 2022.
3. Tribal Transportation Program Coordinating Committee (TTPCC) Meeting in Albuquerque, New Mexico, May 17, 2022.
4. Intertribal Transportation Association (ITA) Virtual Meeting, June 29, 2022.
5. United South and Eastern Tribes Virtual Meeting, July 19, 2022.
6. TTPCC Meeting in Lewiston, Idaho, August 9, 2022.
7. NTICC Meeting in Louisville, Kentucky, August 25, 2022.
8. BIA Alaska Provider's Conference in Anchorage, Alaska, November 30, 2022.
9. ITA Meeting in Las Vegas, Nevada, December 7, 2022.

FHWA and BIA will continue to discuss the proposed rule with the Tribal Governments and the TTPCC. The TTPCC is the committee established by Federal regulations at 25 CFR 170.135 to provide input and recommendations on the TTP to FHWA and BIA. It helps to develop the TTP policies and procedures, and also supplements Government-to-Government consultation by coordinating and obtaining input from Tribes, BIA, and FHWA. The TTPCC consists of 2 representatives from each of the 12 BIA regions, along with 2 non-voting Federal representatives (one each from BIA and FHWA).

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, the FHWA will hold four public information, education, and consultation meetings during the public comment period to explain the rule, answer questions, and take oral testimony. While a court reporter will document these meetings, attendees are encouraged to submit written public comments. Three meetings will be

held in or near Indian country at the locations listed below and a fourth meeting will be held virtually. Additional information on the meetings may be found at https://highways.dot.gov/federal-lands/programs-tribal/bridge. FHWA will hold meetings on the following dates and locations:

1. April 4th, 2023, 2-3 p.m. EST, Virtual Listening Session by Webinar, https://highways.dot.gov/federal-lands/programs-tribal/webinars; Telephone: +1 551 285 1373; Meeting ID: 161 207 5615; Passcode: 042703.

2. April 20th, 2023, 9 – 11 a.m. MDT, Department of the Interior University, National Indian Programs Training Center, Albuquerque, NM.

3. May 17th, 2023, 9 -11 a.m. CST, Great Northern Jerome Hill Theater, St. Paul, MN.

4. May 18th, 2023, 2– 4p.m. PDT, Northwest Region Transportation Symposium, Northern Quest Resort and Casino, Airway Heights, WA.

FHWA will fully consider Tribal views in the development of the final rule in this matter.

Executive Order 12898 (Environmental Justice)

E.O. 12898 requires that each Federal Agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. FHWA has determined that this proposed rule does not raise any environmental justice issues.

Regulation Identification Number

An RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 661

Bridges, Highways and roads, Indians.

Issued under authority delegated in 49 CFR 1.81, 1.84, and 1.85 on:

Andrew Rogers,
Deputy Administrator,
Federal Highway Administration.

In consideration of the foregoing, FHWA proposes to revise part 661 of title 23, Code of Federal Regulations to read as follows:

PART 661—TRIBAL TRANSPORTATION FACILITY BRIDGE PROGRAM (TTFBP)

Sec.

661.1 What is the purpose of this regulation?
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661.31 Do TTF bridge projects have to be listed on an approved TTP TIP?
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661.35 What percentage of TTFBP funding is available for use on BIA and tribally owned TTF bridges, and for non-BIA/non-tribally owned TTF bridges?
661.37 What are the funding limitations on an individual TTF bridge project?
661.39 How are project cost overruns funded?
661.41 After a bridge project has been completed (either PE or construction) what happens with the excess or surplus funding?
661.43 Can other sources of funds be used to finance a queued project in advance of receipt of TTFBP funds?
661.45 What happens when TTFBP funds cannot be obligated by the end of the fiscal year?
661.47 Can routine bridge maintenance be performed with TTFBP funds?
661.49 Can TTFBP funds be spent on Interstate, State Highway, County, City, Township, and Toll Road TTF bridges?
661.51 Can TTFBP funds be used for the approach roadway to a bridge?
661.53 What standards should be used for bridge design?
661.55 How are BIA and Tribal owned in-service TTF bridges inspected?

661.57 What should be done with a BIA and Tribal bridge in poor condition if the Indian Tribe does not support the project?

Authority: 23 U.S.C. 120(j) and (k), 202, and 315; 49 CFR 1.81, 1.84, 1.85, 23 CFR 490 Subpart D.

§ 661.1 What is the purpose of this regulation?

The purpose of this regulation is to prescribe policies for project selection and fund allocation procedures for administering the TTFBP.

§ 661.3 Who must comply with this regulation?

Tribes and Tribal Consortiums must comply with this regulation in applying for TTFBP funds for planning, design, engineering, pre-construction, construction, and inspection of new or replacement TTF bridges classified as in poor condition, having low load capacity, or needing geometric improvements.

§ 661.5 What definitions apply to this regulation?

The following definitions apply to this regulation:

Approach roadway-means the portion of the highway immediately adjacent to the bridge that affects the geometrics of the bridge, including the horizontal and vertical curves and grades required to connect the existing highway alignment to the new bridge alignment using accepted engineering practices and ensuring that all safety standards are met.

Construction engineering (CE) is the supervision, inspection, and other activities required to ensure the project construction meets the project's approved acceptance specifications, including but not limited to: additional survey staking functions considered necessary for effective control of the construction operations; testing materials incorporated into construction; checking shop drawings; and measurements needed for the preparation of pay estimates.

National Bridge Inventory (NBI) means an FHWA database containing bridge information and inspection data for all highway bridges on public roads, on and off Federal-aid highways, including tribally owned and federally owned bridges, that are subject to the National Bridge Inspection Standards.

National Tribal Transportation Facility Inventory (NTTFI) means at a minimum, transportation facilities that are eligible for assistance under the TTP as defined in 25 CFR 170.5.

Operating Rating means the maximum permissible live load to which the structure may be subjected for the load configuration used in the load rating. Allowing unlimited numbers of vehicles to use the bridge at operating level may shorten the life of the bridge.

Plans, specifications and estimates (PS&E) means construction drawings, compilation of provisions, and construction project cost estimates for the performance of the prescribed scope of work.

Preliminary engineering (PE) means planning, survey, design, engineering, and preconstruction activities (including archaeological, environmental, and right-of-way activities) related to a specific bridge project.

Public road means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.

Rehabilitation means major work required to restore the structural integrity of a bridge, as well as work necessary to correct major safety defects. FHWA Bridge Preservation Guide, Spring 2018 Edition.

Replacement means total replacement of an existing bridge with a new facility constructed in the same general traffic corridor. FHWA Bridge Preservation Guide, Spring 2018 Edition.

Tribal Transportation Facility (TTF) means a public highway, road, bridge, trail, transit system, or other approved facility that is located on or provides access to Tribal land and appears on the NTTFI.

TTF bridge means a structure located on the NTTFI, including supports, erected over a depression or an obstruction, such as water, a highway, or a railway, and having a track or passageway for carrying traffic or other moving loads, and having an opening measured along the center of the roadway of more than 20 feet between undercopings of abutments or spring lines of arches, or extreme ends of the openings for multiple boxes; it may also include multiple pipes, where the clear distance between openings is less than half of the smaller contiguous opening.

§ 661.7 What is the TTFBP?

The TTFBP, as established under 23 U.S.C. 202(d), is a nationwide priority program for improving TTF bridges classified as in poor condition, having low load capacity, or needing geometric improvements.

§ 661.9 What is the total funding available for the TTFBP?

The funding source and amount is specified by law, which is subject to change. Due to the complex nature of the funding for the TTFBP, please refer to the applicable statute and applicable FHWA guidance, which can be found on the FHWA's TTFBP Web site.

§ 661.11 When do TTFBP funds become available?

TTFBP funds are authorized at the start of each fiscal year but are subject to Office of Management and Budget apportionment before they become available to FHWA for further distribution.

§ 661.13 How long are these funds available?

TTFBP funds for each fiscal year are available for obligation for the year authorized plus 3 years (a total of 4 years).

§ 661.15 What are the eligible activities for TTFBP funds?

TTFBP funds can be used: (a) to carry out any planning, design, engineering, preconstruction, construction, and inspection of new or replacement TTF bridges;

(b) to replace, rehabilitate, seismically retrofit, paint, apply calcium magnesium acetate, sodium acetate/formate, or other environmentally acceptable, minimally corrosive anti-icing and deicing composition; or

(c) to implement any countermeasure for TTF bridges classified as in poor condition, having a low load capacity, or needing geometric improvements, including multiple-pipe culverts; or

(d) to demolish the old bridge if a bridge is replaced under the TTFBP.

§ 661.17 What are the criteria for bridge eligibility?

(a) For bridge replacement or rehabilitation, TTF bridges are required to meet the following:

(1) have an opening of 20 feet or more;

(2) be classified as a Tribal transportation facility;

(3) be classified as in poor condition, have low load capacity, or need highway geometric improvements;

(4) be recorded in the NBI maintained by FHWA.

(b) For new bridge construction, TTF bridges are required to meet the following:

(1) be classified as a Tribal transportation facility;

(2) be a public bridge with opening of 20 feet or more, and recorded in the NBI after project completion.

§ 661.19 When is a bridge eligible for replacement?

To be eligible for replacement, a TTF bridge must be in poor condition, have low load capacity, or need highway geometric improvements.

§ 661.21 When is a bridge eligible for rehabilitation?

To be eligible for rehabilitation, a TTF bridge must be in poor or fair condition, have low load capacity, or need highway geometric improvements.

§ 661.23 How will a bridge project be programmed for funding once eligibility has been determined?

(a) All projects will be programmed for funding after a completed application package is received and accepted by FHWA. At that time, the project will be acknowledged as either BIA and tribally owned, or non-BIA/non-tribally owned and placed in either a PE or a construction queue.

(b) All projects will be ranked and prioritized based on the following criteria:

(1) bridge condition with bridges in poor condition, having precedence over bridges in fair condition, and bridges in fair condition having precedence over bridges in good condition.

(2) low load capacity bridges based on Operating Rating;

(3) bridges on school bus routes;

(4) bypass detour length;

(5) annual average daily traffic; and

(6) annual average daily truck traffic.

(c) Queues will carryover from fiscal year to fiscal year as made necessary by the amount of annual funding made available.

(d) TTF bridges will be classified as good, fair, or poor based on the following criteria:

(1) Good: When the lowest rating of the 3 NBI items for a bridge (Items 58-Deck, 59-Superstructure, 60-Substructure) is 7, 8, or 9, the bridge will be classified as good. When the rating of the NBI item for a culvert (Item 62-Culvert) is 7, 8, or 9, the culvert will be classified as good.

(2) Fair: When the lowest rating of the three NBI items for a bridge is 5 or 6, the bridge will be classified as fair. When the rating of the NBI item for a culvert is 5 or 6, the culvert will be classified as fair.

(3) Poor: When the lowest rating of the three NBI items for a bridge is 4, 3, 2, 1, or 0, the bridge will be classified as poor. When the rating of the NBI item for a culvert is 4, 3, 2, 1, or 0, the culvert will be classified as poor. A poor condition bridge with a lower condition rating will have precedence over a poor condition bridge with a higher condition rating.

§ 661.25 What does a complete application package for PE consist of and how does the project receive funding?

(a) A complete application package for PE consists of the following:

(1) the certification checklist,

(2) Tribal Transportation Program (TTP) transportation improvement program (TIP),

(3) project scope of work,

(4) detailed cost for PE,

(5) NBI data, and

(6) an acknowledgment by the Tribe of the project specific funding requirements and that any excess funds will be returned to FHWA for further distribution.

(b) For non-BIA/non-tribally owned TTF bridges, the application package must also include a Tribal resolution supporting the project and identification of the required minimum 20 percent local funding match.

(c) Incomplete application packages will be disapproved and returned for revision and resubmission along with an explanation providing the reason for disapproval.

(d) The TTF bridge projects for PE will be placed in the queue and determined as eligible for funding after receipt by FHWA of a complete application package.

(e) Funding for the approved eligible projects on the queues will be made available to the Tribes, under a TTP Program agreement between FHWA and a Tribal Government or Consortium or the Secretary of the Interior upon availability of program funding at FHWA.

§ 661.27 What does a complete application package for construction consist of and how does the project receive funding?

(a) A complete application package for construction consists of the following:

(1) a copy of the approved PS&E,

(2) the certification checklist,

(3) NBI data,

(4) the TTP TIP,

(5) all environmental and archeological clearances and complete grants of public rights-of-way that must be acquired prior to submittal of the construction application package, and

(6) an acknowledgment by the Tribe of the project specific funding requirements and that any excess funds will be returned to FHWA for further distribution.

(b) For non-BIA/non-tribally owned TTF bridges, the application package must also include a copy of a letter from the bridge's owner approving the project and its PS&E, a Tribal resolution supporting the project, and identification of the required minimum 20 percent local funding match.

(c) Incomplete application packages will be disapproved and returned for revision and resubmission along with an explanation providing the reason for disapproval.

(d) The TTF bridge projects for construction will be placed in the queue and determined as eligible for funding after receipt by FHWA of a complete application package.

(e) Funding for the approved eligible projects in the queues will be made available to the Tribes, under a TTP Program Agreement between FHWA and a Tribal Government or Consortium, or the Secretary of the Interior upon availability of program funding at FHWA.

§ 661.29 How does ownership impact project selection?

Primary consideration will be given to eligible projects on BIA and tribally owned TTF bridges. A smaller percentage of available funds will be set aside for non-BIA/non-tribally owned TTF bridges, since States and counties have access to Federal-aid and other funding to design, replace, and rehabilitate their bridges.

The program policy will be to maximize the number of TTF bridges participating in the TTFBP in a given fiscal year regardless of ownership.

§ 661.31 Do TTF bridge projects have to be listed on an approved TTP TIP?

Yes. All TTF bridge projects must be listed on an approved FHWA TTP TIP. TTF bridge projects included in the TTP TIP that are not fiscally constrained may still be included as a list of projects dependent upon the availability of additional resources, also known as an "illustrative list."

§ 661.33 What percentage of TTFBP funding is available for PE and construction?

Up to 15 percent of the funding made available in any fiscal year will be eligible for PE. The remaining funding in any fiscal year will be available for construction.

§ 661.35 What percentage of TTFBP funding is available for use on BIA and tribally owned TTF bridges, and for non-BIA/non-tribally owned TTF bridges?

(a) Up to 80 percent of the available funding made available for PE and construction in any fiscal year will be eligible for use on BIA and tribally owned TTF

bridges. The remaining funding in any fiscal year will be made available for PE and construction for use on non-BIA/non-tribally owned TTF bridges.

(b) At various times during the fiscal year, FHWA will review the projects awaiting funding and may shift funds between BIA and tribally owned, and non-BIA/non-tribally owned bridge projects to maximize the number of projects funded and the overall effectiveness of the program.

§ 661.37 What are the funding limitations on an individual TTF bridge project?

The following funding provisions apply in administration of the TTFBP:

(a) An eligible BIA/tribally owned TTF bridge is eligible for 100 percent TTFBP funding, with a $150,000 maximum limit for PE.

(b) An eligible non-BIA/non-tribally owned TTF bridge is eligible for up to 80 percent TTFBP funding, with a $150,000 maximum limit for PE and $1,000,000 maximum limit for construction. The minimum 20 percent local match will need to be identified in the application package. TTP construction funds received by a Tribe may be used as the local match.

(c) Requests for additional funds above the referenced thresholds may be submitted along with proper justification to FHWA for consideration. The request will be considered on a case-by-case basis. There is no guarantee for the approval of the request for additional funds.

§ 661.39 How are project cost overruns funded?

(a) A request for additional TTFBP funds for cost overruns on a specific bridge project must be submitted to Bureau of Indian Affairs Division of Transportation (BIADOT) and FHWA for approval. The written submission must include a justification, an explanation as to why the overrun occurred, and the amount of additional funding required with supporting cost data. If approved by FHWA and BIADOT, the request will be placed at the top of the appropriate queue (with a contract modification request having

a higher priority than a request for additional funds for a project award) and funding may be provided if available.

(b) Project cost overruns may also be funded out of the Tribe's regular TTP construction funding.

§ 661.41 After a bridge project has been completed (either PE or construction) what happens with the excess or surplus funding?

Since the funding is project specific, once a bridge design or construction project has been completed under this program, any excess or surplus funding is returned to FHWA for use on additional approved TTF bridge projects.

§ 661.43 Can other sources of funds be used to finance a queued project in advance of receipt of TTFBP funds?

Yes. A Tribe can use other sources of funds, including TTP construction funds, on a project that has been approved for funding and placed on the queue and then be reimbursed when TTFBP funds become available. If TTP construction funds are used for this purpose, the funds must be identified on an FHWA approved TTP TIP prior to their expenditure.

§ 661.45 What happens when TTFBP funds cannot be obligated by the end of the fiscal year?

The TTFBP funds from the Highway Trust Fund (HTF) provided to a project that cannot be obligated by the end of the fiscal year are to be returned to FHWA during August redistribution. The returned funds will be re-allocated to the BIA the following fiscal year after FHWA receives and accepts a formal request for the funds from BIA, which includes a justification for the amounts requested and the reason for the failure of the prior year obligation.

§ 661.47 Can routine bridge maintenance be performed with TTFBP funds?

No. Routine bridge maintenance repairs, e.g., guard rail repair, repair of traffic control devices, striping, cleaning scuppers, deck sweeping, snow and debris removal, etc., are not eligible uses of TTFBP funding. The U.S. Department of the Interior's annual allocation for maintenance as well as TTP construction funds are eligible funding sources for routine bridge maintenance.

§ 661.49 Can TTFBP funds be spent on Interstate, State Highway, County, City, Township, and Toll Road TTF bridges?

Yes. Interstate, State Highway, County, City, Township, and Toll Road TTF bridges are eligible for funding as described in § 661.37(b).

§ 661.51 Can TTFBP funds be used for the approach roadway to a bridge?

Yes, costs associated with approach roadway work, as defined in § 661.5 are eligible. Long approach fills, causeways, connecting roadways, interchanges, ramps, and other extensive earth structures, when constructed beyond an attainable touchdown point, are not eligible uses of TTFBP funds.

§ 661.53 What standards should be used for bridge design?

(a) New and Replacement—New and replacement structure must meet the current geometric, construction and structural standards required for the types and volumes of projected traffic on the facility over its design life consistent with 25 CFR part 170, Subpart D, Appendix B and 23 CFR part 625.

(b) Rehabilitation—Bridges to be rehabilitated, at a minimum, should conform to the standards of 23 CFR part 625, Design Standards for Federal-aid Highways, for the class of highway on which the bridge is a part.

§ 661.55 How are BIA and Tribally owned in-service TTF bridges inspected?

The BIA and tribally owned in-service TTF bridges are inspected in accordance with 25 CFR 170.513-170.514.

§ 661.57 What should be done with a BIA and Tribal bridge in poor condition if the Indian Tribe does not support the project?

The restrictions set forth in 25 CFR 170.114(a)(1) shall apply.

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