

III. Program Agreements (PA)

Overview. Prior to SAFETEA-LU, Indian Tribal governments work directly with the BIA or the DOI, Assistant Secretary of Indian Affairs in implementing the IRR program.

Since SAFETEA-LU, Indian Tribal governments have a choice in administration of the IRR program. As a result, under 23 U.S.C. 202(d), the Secretary of Transportation is authorized to enter into agreements with an Indian Tribal government to carry out a highway, road, bridge, parkway, or transit program or projects. This allows Tribes the option of working directly with the FHWA in the administration of their IRR program. In addition, the BIA can also enter into an agreement with a Tribal government to carry out their transportation program. (See chart below)

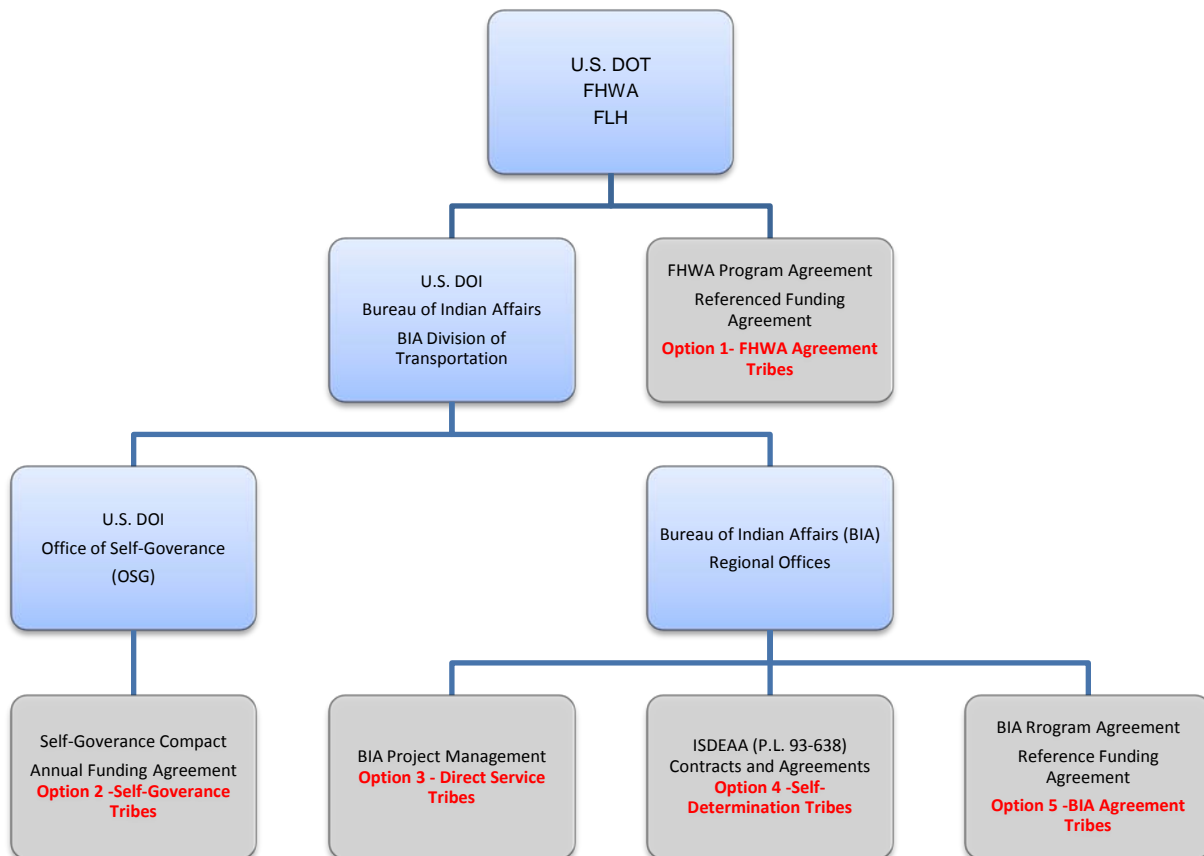


Chart 3.1: The five options the Indian Tribal governments have in administration of the IRR Program.

Tribes that intend to work directly with the FHWA or the BIA in the administration of their transportation program must enter into a Program Agreement. Tribes must demonstrate to the satisfaction of the Secretary of Transportation “financial stability and financial management capability during the three fiscal years immediately preceding the fiscal year for which the request is being made.”

Under 23 U.S.C. 202(d)(5)(f), “an Indian Tribal government that had no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribal government self-determination contracts or self-governance funding agreements with any Federal agency during the three fiscal year period . . . shall be conclusive evidence of the financial stability and financial management capability.”

Federal law, the standard FHWA Program Agreement, and the BIA Program Agreement, gives hiring and training preferences, to the greatest extent feasible, to Indians for all work performed under the IRR Program. Under 25 U.S.C. 450e(b) and 23 U.S.C. 204(e), Indian organizations and Indian-owned economic enterprises are entitled to a preference, to the greatest extent feasible, in the award of contracts, subcontracts, and sub-grants for all work performed under the IRR Program. In addition, under the standard FHWA Program Agreement or the BIA Program Agreement, the Tribe’s employment rights and contracting preference laws, including Tribal preference laws, apply to work performed under the particular Agreement.

Finally, in exercising responsibility for carrying out the eligible programs and projects, the Tribe, through assurances to the FHWA or the BIA, will certify they will meet all applicable health, safety, and labor standards related to the administration, planning, engineering, and construction activities performed.

Below is a list of some respective regulations related to the implementation and oversight of the program:

- 23 CFR 625 – Design Standards for Highways
- 23 CFR 630 – Preconstruction Procedures
- 23 CFR 650 – Bridges, Structures, and Hydraulics
- 23 CFR 661 – Indian Reservation Road Bridge Program
- 23 CFR 710 – Right-of-Way
- 23 CFR 771 – Environmental Impact and Related Procedures
- 25 CFR 170 – Indian Reservation Roads Program
- 29 CFR 1910 – Occupational Safety and Health Standards
- BIA NEPA
- Government Performance and Results Act

A. Definitions:

Program Agreement (PA) – A standardized document between the FHWA or the BIA and a Tribe which authorizes the Tribe to perform the planning, research, design, engineering, construction, and maintenance of highway, road, bridge, parkway, or transit facility programs or projects that are located on or which provide access to a Tribe or a community of the Tribe and are eligible for funding pursuant to 25 CFR Part 170. (See **Example 3.1 – Program Agreement**)

FHWA Tribal Coordinator – The main FHWA point of contact located near Tribes which leads the coordination between Tribal Government and FHWA Headquarters for the Program Agreement and Reference Funding Agreement. This person also has the primary function to provide technical assistance, management, and coordination required for improving tribal transportation system, including planning, design, and construction functions, and overall tribal transportation system safety.

BIA Federal Point of Contact (FPOC) – The main BIA Regional Road Engineer located in the nearest field office or region to a Tribe leading the coordination between a Tribal government and a BIA Region for the Program Agreement and Reference Funding Agreement. This person also

has the primary function to provide technical assistance, management, and coordination required for improving tribal transportation system, including planning, design, and construction functions, and overall tribal transportation system safety.

Tribal Resolution or Authorizing Document – A document provided to the FHWA or the BIA by a Tribe stating the Tribe’s intent to enter into a “Program Agreement” with the FHWA or the BIA. (See **Example 3.2 –Tribal Resolution**)

Financial Management Documentation. A letter submitted to the FHWA or the BIA by a Tribe attesting to the lack of material audit exceptions for the prior three fiscal year period.

Assurances - A positive declaration from a Tribe intended to give confidence to the FHWA or the BIA that projects and/or other program areas implemented by the Tribe are being carried out in accordance with all Federal requirements.

B. Statutory/Regulatory Requirements

- 23 U.S.C. 202(d)

C. Guidelines, Procedures, and Process

Intent to Enter into a Program Agreement. The Tribal government will contact FHWA or the BIA in the form of a letter or e-mail, their desire to exercise the option of working directly with the FHWA or the BIA and enter into a contract agreement with the FHWA or the BIA in the administration of their program.

For the Tribes wishing to work with FHWA, the FHWA Tribal Coordinator will e-mail to the Tribe the process as outlined below including all forms:

The following is the process for contracting with FHWA:

1. *Provide the FHWA Tribal Coordinator with a Tribal Resolution or Authorizing Document (see example Tribal Resolution).*

The FHWA Tribal Coordinator will send the document to FHWA-FLH-HQTS for approval.

The FHWA Tribal Coordinator will notify the BIA Regional Road Engineer of the Tribe’s intent to enter into a “Program Agreement” with FHWA. For a Tribe currently participating in a self-governance compact (either individually or as part of a consortium) the FHWA Tribal Coordinator will notify the Office of Self-Governance (OSG), Department of the Interior, that it has received a letter of intent from the Tribe.

2. *Once the Tribal Resolution or Authorizing Document is received and reviewed by FHWA, the FHWA Tribal Coordinator, will request the Tribe to ask their auditors to prepare a letter attesting to the lack of material audit exceptions for the prior three fiscal year period and a copy of the audit. FHWA doesn’t necessarily need the full report, but any findings and discussions related to their DOT program, as well as for All-Federal programs in which the DOT is included.*

The audit information will be sent to the FHWA Tribal Coordinator who will forward it to FHWA-FLH-HQTS for review.

- 3. FHWA-FLH-HQTS will review the audits and make a determination of their financial stability.*
- 4. Once the audit is reviewed and approved by FHWA, a Program Agreement will be sent by the FHWA Tribal Coordinator to the Tribal leadership for signature. (Please Note: Any major change to the PA will require a FHWA legal review.)*

In addition, an Automated Clearing House (ACH) Banking information form will be sent to the Tribe. The form can also be accessed at:

<http://www.eda.gov/PDF/FORM%20SF-3881%20ACH.pdf>

Both documents will be returned to the FHWA Tribal Coordinator. The FHWA Tribal Coordinator will forward the documents to FHWA-FLH-HQTS.

- 5. When FHWA and the Tribe have both signed the PA, a Referenced Funding Agreement (RFA) with appropriate year funding amount will be sent by the FHWA Tribal Coordinator to the Tribe for signature (attached).*

The signed RFA will be returned to the FHWA Tribal Coordinator who will forward the documents to FHWA-FLH-HQTS.

- 6. Once FHWA and the Tribe have both signed RFA, the funding will be sent by FHWA to the Tribe's established account.*

Attached files:

Example Tribal Resolution

Program Agreement

ACH Banking Form

Referenced Funding Agreement

For the Tribes wishing to work with the BIA, the BIA FPOC will e-mail to the Tribe the process as outlined below including all forms:

The following is the process for contracting with BIA:

- 1. Provide the FPOC with a Tribal Resolution or Authorizing Document (see example Tribal Resolution).*

The FPOC will send the document to appropriate BIA office for approval.

The FPOC will notify the BIA Regional Road Engineer of the Tribe's intent to enter into a "Program Agreement. For a Tribe currently participating in a self-governance compact (either individually or as part of a consortium) the FPOC will notify the Office of Self-Governance (OSG), Department of the Interior, that it has received a letter of intent from the Tribe.

2. *Once the Tribal Resolution or Authorizing Document is received and reviewed by BIA, the FPOC, will request the Tribe to ask their auditors to prepare a letter attesting to the lack of material audit exceptions for the prior three fiscal year period and a copy of the audit. BIA doesn't necessarily need the full report, but any findings and discussions related to their DOT program, as well as for All-Federal programs in which the DOT is included.*

The audit information will be sent to the BIA FPOC who will forward it to the appropriate BIA office for review.

3. *The appropriate BIA office will review the audits and make a determination of their financial stability.*
4. *Once the audit is reviewed and approved by the BIA, a Program Agreement will be sent by the BIA to the Tribal leadership for signature. (Please Note: Any major change to the PA will require a BIA legal review.)*

In addition, an Automated Clearing House (ACH) Banking information form will be sent to the Tribe. The form can also be accessed at:

<http://www.eda.gov/PDF/FORM%20SF-3881%20ACH.pdf>

Both documents will be returned to the BIA FPOC. The BIA FPOC will forward the documents to the appropriate BIA office.

5. *When BIA and the Tribe have both signed the PA, a Referenced Funding Agreement (RFA) with appropriate year funding amount will be sent by the BIA FPOC to the Tribe for signature (attached).*

The signed RFA will be returned to the BIA FPOC who will forward the documents to the appropriate BIA office..

6. *Once the BIA and the Tribe have both signed RFA, the funding will be sent by BIADOT to the Tribe's established account.*

Attached files:

Example Tribal Resolution

Program Agreement

ACH Banking Form

Referenced Funding Agreement

Example 3.1 – FHWA Program Agreement (NOTE: BIA Program Agreement is slightly different to reflex BIA references)

**INDIAN RESERVATION ROADS PROGRAM
AGREEMENT
BETWEEN
THE (INSERT NAME OF TRIBE)
AND THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
ARTICLE I – AUTHORITY AND PURPOSE**

Section 1. Authority. This Indian Reservation Roads Program Agreement (hereinafter “the Agreement”) is entered into by the Administrator, Federal Highway Administration, (hereinafter “Administrator”), for and on behalf of the United States Department of Transportation (hereinafter “DOT”) and by the (INSERT OF TRIBE) (hereinafter “the Tribe”) (collectively hereinafter the “Parties”), under the authority of the Constitution and By-Laws of the Tribe and by resolution of the Tribal Government, a copy of which is attached hereto, and under the authority granted by section 202(d)(5) of Chapter 2 of Title 23, United States Code, as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144 (August 10, 2005), and the Delegations of Authority set forth in 49 CFR § 1.48(b)(29). This agreement will be implemented in a manner consistent with Executive Order 13175 (Nov. 6, 2000, 65 Fed. Reg. 67249) (Consultation and Coordination with Indian Tribal Governments) and the DOT’s Order regarding Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (DOT 5301.1, November 16, 1999), as amended by SAFETEA-LU. This Agreement authorizes the Tribe to perform the planning, research, design, engineering, construction, and maintenance of highway, road, bridge, parkway, or transit facility programs or projects that are located on or which provide access to the (INSERT NAME OF TRIBE) Reservation (ALASKA NATIVE VILLAGE/CONSORTIUM) or a community of the Tribe and are eligible for funding pursuant to 25 CFR Part 170. This Agreement is made pursuant to 23 U.S.C. § 202(d)(5), as amended by section 1119(g)(4) of SAFETEA-LU, the Indian Reservation Roads (IRR) Program regulations (25 CFR Part 170), and in accordance with the Indian Self-Determination and Education Assistance Act (hereinafter “the ISDEAA”), Pub. L. 93-638, as amended (25 U.S.C. § 450 et seq.).¹

Section 2. Purpose. The purpose of this Agreement is as follows:

- (1) to transfer to the Tribe all of the functions and duties that the Secretary of the Interior would have performed with respect to a program or project under Chapter 2 of Title 23, United States Code, other than those functions and duties that cannot be legally transferred under the ISDEAA, together with such additional activities as the Tribe may perform under SAFETEA-LU and the IRR Program regulations (25 CFR Part 170);

¹ The Tribe and FHWA have recognized that each Party has a different understanding as to the application of the ISDEAA (Act) and its implementing regulations (25 CFR Parts 900 and 1000) to this Agreement. It is expressly understood that through the execution of this Agreement, neither party waives any rights regarding the application of the aforementioned Act and its regulations to this Agreement and no precedent is established for future agreements with this Tribe or any other Indian Tribe. The parties agree to work in good faith to resolve this issue in future agreements.

(2) to carry out the Federal Highway Administration's (FHWA) statutory requirements pursuant to section 1119 of SAFETEA-LU and to maintain and improve its unique and continuing government-to-government relationship with and responsibility to the Tribe;

(3) to provide the Tribe or its designee, under the attached Referenced Funding Agreement (RFA), its formula share of IRR Program funds pursuant to 25 CFR Part 170, and those additional amounts as the Administrator determines equal the amounts that would have been withheld for the costs of the Bureau of Indian Affairs for administration of the program or project, together with such additional Federal Lands Highways funds as the Tribe may receive or otherwise be entitled to through a formula or competitive grant, award, earmark or other appropriation to the Department of Transportation (DOT). The **(INSERT BIA REGION)** Bureau of Indian Affairs (BIA) Regional Office shall continue to receive the funds identified in 23 U.S.C. § 202(d)(2)(F)(i) for certain program management and oversight (PM&O) activities and project-related administrative expenses as further identified in Article II, Section 2 and the attached RFA (Attachment A).

ARTICLE II – TERMS, PROVISIONS, and CONDITIONS

Section 1. Effective Date and Term: This agreement shall become effective upon the date of its approval and execution by authorized representatives of the Tribe and the Administrator and shall extend for the maximum period authorized by any statutory extensions to SAFETEA-LU. In the event SAFETEA-LU is reauthorized in whole or in part, this agreement shall continue to the extent authorized by law until a successive agreement is negotiated by the parties.

Section 2. Funding.

A. Subject to the availability of funding and in accordance with 23 U.S.C. § 202(d)(5)(E), as amended by section 1119(g)(4) of Pub. L. 109-59, the Administrator shall provide to the Tribe or its designee, through an electronic transfer, a single annual lump sum funding amount equal to the amount that the Tribe would otherwise receive for the IRR program in accordance with the funding formula applicable to the IRR Program (25 CFR Part 170, Subpart C), and such additional amount, as determined by the Administrator that would have been withheld by the BIA for the administration of the Tribe's IRR Program or projects. The Parties agree to annually provide the Tribe the amounts that would have been withheld for the costs of the BIA for administration of the Tribe's program or projects as provided in 23 U.S.C. § 202(d)(5)(E) and further identified in Attachment A to this Agreement.

B. Upon the execution of this Agreement and the RFA by both Parties, and subject to the availability of funds and the determination of the Tribe's annual Relative Need Distribution Factor (RNDF) percentage, the Administrator shall notify the Tribe or its designee, in accordance with Article IV, section 5, that the funds identified in the RFA are available. The Tribe shall submit electronic banking information under an ACH Vendor/Miscellaneous Payment Enrollment Form (see Attachment B) to the Administrator and the Administrator shall provide to the Tribe a single advance payment in the amount identified in the attached RFA within thirty (30) calendar days of his receipt of the Payment Enrollment Form. The Parties agree that the RFA will be renegotiated annually on a fiscal year basis.

C. Pursuant to section 1119(g)(5)(B) of SAFETEA-LU (23 U.S.C. § 202(d)(5)), all funds shall be paid to the Tribe without regard to the organizational level at which the Department of the Interior or the DOT has previously carried out under the Federal Lands Highways Program, the programs, functions, services, or activities (PFSAs) involved.

D. Pursuant to 25 CFR §§ 170.607 – 170.608, Contract Support Costs are an eligible cost and the Tribe may use their IRR Program allocation to pay such costs. The Tribe shall include a line item for Contract Support Costs in the Tribe's project construction budgets. The Tribe may also include, as eligible Contract Support Costs, one-time start-up costs and preaward costs incurred by the Tribe in the initial year of this Agreement in accordance with 25 U.S.C. §§ 450j-1(a)(5) and (6). The Parties acknowledge that no additional IRR Program funds are available for Contract Support Costs.

E. Funds advanced to the Tribe under this Agreement shall be used by the Tribe as permitted under 23 U.S.C. § 202(d) and 25 CFR Part 170, as amended by SAFETEA-LU, other applicable laws, and as authorized under this Agreement. The Tribe reserves the right to reallocate funds among the eligible projects identified on an FHWA-approved IRR Transportation Improvement Program (IRRTIP), so long as such funds are used in accordance with Federal appropriations law. Funds advanced to the Tribe pending disbursement for a purpose authorized under the Agreement shall be placed in appropriate savings, checking or investment accounts. For purposes of this Agreement, such funds when invested or deposited by the Tribe shall be subject to the following:

(i) Advanced funds not immediately spent for program activities may be invested only in obligations of the United States, in obligations or securities that are guaranteed or insured by the United States, or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed by the United States;

(ii) If not invested, advanced funds must be deposited into accounts that are insured by an agency or instrumentality of the United States or must be fully collateralized to ensure protection of the funds, even in the event of a bank failure;

(iii) Interest and investment income that accrue on any funds provided for by agreement become the property of the Tribe in accordance with the provisions of 25 U.S.C. § 450j(b) and may be used on projects identified on an FHWA approved IRRTIP (section 1119(c) of SAFETEA-LU).

(iv) Upon the receipt of funds under this Agreement, the Tribe shall expend the funds for the purposes set forth in this Agreement and as authorized by law; provided however that the Tribe may accumulate multiple annual allocations of IRR Program funds when necessary to fund an eligible project which requires more than one fiscal year of funding and is identified on a tribal TIP or a tribal priority list (25 CFR Part 170).

F. The Tribe may use funds provided under this agreement for flexible financing as provided in 23 U.S.C. § 122, 25 CFR §§ 170.300 – 303, and other applicable laws.

G. 1. The Tribe may issue bonds or enter into other debt financing instruments under 23 U.S.C. §122 with the expectation of payment of IRR Program funds to satisfy the instruments, including, but not limited to, the repayment of loan principal and interest on such debt instruments. When the Tribe elects to use flexible financing to advance construct an eligible project or projects under this Agreement, the Administrator agrees (i) to maintain the project(s) on the FHWA-approved TIP until all debt instruments, including interest thereon, are repaid in full by the Tribe, and (ii) at the option and direction of the Tribe (after receipt of electronic banking information on the Payment Enrollment Form by the Administrator), to provide all or a portion of the funds the Tribe is eligible to receive under this Agreement directly to a trustee or other depository so designated by the Tribe pursuant to the provisions of any RFA received by the Administrator there under.

2. The designation of an eligible debt financing instrument for reimbursement with funds awarded under this Agreement shall not –

a) constitute a commitment, guarantee, or obligation on the part of the United States to provide for payment of principle or interest on the eligible debt financing instrument entered into by the Tribe; or

b) create any right of a third party against the United States for payment under the eligible debt financing instrument.

H. As authorized by 25 CFR § 170.301, the Tribe may use IRR Program funds to:

i. leverage other funds; and

ii. pay back loans or other finance instruments for a project that:

(a) the Tribe paid for in advance of the current year using non-IRR Program funds, including Tribal funds; and

(b) was included in an FHWA-approved IRRTIP.

I. The Tribe may use IRR Program funds awarded under this Agreement to meet matching or cost participation requirements for any Federal or non-Federal transit grant or program.

J. The Parties agree that this Agreement is entered into, and that funds are made available to the Tribe, in accordance with the ISDEAA pursuant to 23 U.S.C. § 202(d)(5), as amended by section 1119(g)(4) of SAFETEA-LU. Payments made by the Administrator under this Agreement shall be made in accordance with Article II, Section 2.B. herein. In the event funds due the Tribe under this Agreement are not paid to the Tribe in accordance with the requirements of Article II, Section 2.B., the Parties shall rely upon the dispute resolution provisions set forth in Article II, Section 4 of this Agreement.²

Section 3. Powers. The Tribe shall have all powers that the Secretary of the Interior would have exercised in administering the funds provided to the Tribe for such program under 23 U.S.C. § 202(d), except to the extent that such powers are powers that inherently cannot be legally transferred under the ISDEAA. Such powers shall include, but are not limited to the Secretary of the Interior's powers under 25 CFR Part 170, together with such duties and responsibilities as may be performed by an Indian tribe under the 25 CFR Part 170 regulations or as are otherwise permitted by law.

Section 4. Dispute Resolution. In the event of a dispute arising under this Agreement, the Tribe and the Administrator agree to use mediation, conciliation, arbitration, and other dispute resolution procedures authorized under 25 CFR § 170.934. The goal of these dispute resolution procedures is to provide an inexpensive and expeditious forum to resolve disputes. The Administrator agrees to resolve disputes at the lowest possible staff level and by consent whenever possible.

Section 5. Construction of this Agreement. This Agreement shall be construed in a manner to facilitate and enable the transfer of programs authorized by 23 U.S.C. § 202, as amended by SAFETEA-LU, Pub. L. 109-59, 119 Stat. 1144 (August 10, 2005).

Section 6. Activities to be Performed. The activities covered by this Agreement are:

- Transportation Planning;
- Construction Management;
- Program Administration;
- Design;
- Construction;
- Road Maintenance as authorized under SAFETEA-LU section 1119(i) (not more than 25% of the funds allocated to a tribe may be expended for the purpose of maintenance, excluding road sealing which shall not be subject to any limitation);
- Development and negotiation of Tribal-State road maintenance agreements authorized under section 1119(k) of SAFETEA-LU;
- **(INSERT ANY ADDITIONAL ITEMS)**; and
- Other IRR Program-eligible activities authorized under Chapter 2 of Title 23 or 25 CFR Part 170, as each may be amended by SAFETEA-LU, or other applicable law.

Section 7. Limitation of Costs. The Tribe shall not be obligated to continue performance under this Agreement that requires an expenditure of funds in excess of the amount of funds awarded under this Agreement or the RFA. If, at any time, the Tribe has reason to believe that the total amount required for performance of this Agreement, or a specific activity conducted under this Agreement or the RFA would be greater than the amount of funds provided under this Agreement or the RFA, the Tribe shall provide reasonable notice to the Administrator. If the Administrator does not increase the amount of funds allocated under this Agreement or the RFA, the Tribe may suspend performance of the Agreement until such time as additional funds are made available.

² The language of footnote 1 is incorporated by reference herein.

Section 8. Carryover. Any funds provided to the Tribe under this Agreement or the RFA which have not been expended at the conclusion of the fiscal year in which such funds were allocated shall remain in the custody of the Tribe and be used for the purposes authorized under this Agreement. Determination of the priority and amount of funds to be used for each program, function, service or activity shall be the responsibility of the Tribe, except as limited by law or otherwise proscribed by this Agreement.

Section 9. Applicable Regulations. 25 CFR Part 170, and any amendments thereto apply to this Agreement.³ The Tribe may seek a waiver of these regulations to the extent permitted by law and as set out in 25 CFR §§ 170.625 and 170.626.

Section 10. Use of Tribal Facilities and Equipment. (INSERT ANY SPECIAL EQUIPMENT ISSUES) The Parties agree that the Tribe shall be permitted to utilize IRR Program and other Federal Lands Highway funds awarded under this Agreement to pay such lease/rental rates, as well as to maintain such facilities and equipment when performing PFSAs under this Agreement. For purposes of this Agreement, in those cases where the Tribe reasonably determines, and provides written notice and analysis documentation to the Administrator that the purchase of equipment is more cost effective than the leasing of equipment, the Parties agree that the purchase of construction equipment shall be an allowable cost to the Tribe, as permitted under 25 CFR Part 170, Appendix A to Subpart G, so long as not more than 25% of the Tribe's IRR Program funds are used for this purpose.

ARTICLE III – RESPONSIBILITIES OF THE TRIBE

Section 1. A. Health and Safety. In exercising responsibility for carrying out the eligible programs and projects under this Agreement, the Tribe assures the Administrator that within available funding, they will meet all applicable health, safety, and labor standards related to the administration, planning, engineering and construction activities performed. To this end, and within available funding, the Tribe agrees to obtain or provide qualified personnel, equipment, materials, and services necessary to administer the transportation programs, including opportunities that provide for Indian preference in employment and sub-contracting as mandated by 25 U.S.C. § 450e(b).

B. Program Standards and Regulations. The Tribe agrees to initiate and perform the contracted programs and projects in accordance with the requirements of 25 CFR Part 170, as amended by SAFETEA-LU. Additionally, the Tribe may, at its sole option, adopt applicable FHWA or BIA policies, procedures, program guidelines and memoranda, or develop tribal policies, procedures, program guidelines and memoranda which meet or exceed federal standards to facilitate operation or administration of any aspect of the programs assumed by or delegated to the Tribe under this Agreement.

C. Plans, Specifications and Estimate (PS&E) Approval Authority.

(1) Tribal and BIA-owned facilities. The Tribe is authorized to review and approve plans, specifications and estimates ("PS&E") project packages in accordance with the requirements of 25 CFR §§ 170.460 through 170.463, as amended by section 1119(e) of SAFETEA-LU (amending § 202(d)(2) of Chapter 2 of Title 23, United States Code), and provide a copy of said PS&E approval to the facility owner. The Tribe hereby:

- a) provides assurances under this Agreement that the construction will meet or exceed applicable health and safety standards;
- b) agrees to obtain the advance review of the PS&E from a State-licensed civil engineer who has certified that the PS&E meet or exceed the applicable health and safety standards; and

³ The language of footnote 1 is incorporated by reference herein.

c) will provide a copy of the State-licensed civil engineer's certification to the Deputy Assistant Secretary for Tribal Government Affairs, with a copy to the Federal Lands Highways Associate Administrator and BIA.

(2) Facilities owned or maintained by a public authority other than the Tribe or the BIA. In the interest of building stronger government-to-government relations in transportation planning and coordination, the Tribe voluntarily agrees to perform its PS&E review and approval function as to facilities owned or maintained by a public authority, as that term is defined in 23 U.S.C. § 101(a)(23), as follows. For a facility owned or maintained by a public authority other than the BIA or the Tribe, in addition to satisfying the requirements of paragraph (C)(1) herein, the Tribe further agrees to:

a) provide the public authority an opportunity to review and comment on the Tribe's PS&E package when it is between 75 and 95 percent complete, unless an agreement between the Tribe and the public authority states otherwise;

b) allow the public authority at least 30 days for review and comment on the PS&E package, unless the Tribe and the public authority agree upon a longer period of time;

c) before soliciting bids for the project(s), certify in writing to the Administrator that it afforded the public authority an opportunity to review and comment on the PS&E package and received no written comments from the public authority that prevent the Tribe from proceeding with the project.⁴

D. Transportation Planning and Inventory. Within available funding, the Tribe further agrees to carry out a transportation planning process and provide this information to the BIA, with courtesy copies to FHWA, as may be reasonably necessary for the BIA to maintain an updated inventory of roads and bridges and to develop the annual IRR Transportation Improvement Program (IRRTIP).

E. Easements, Maintenance and Utility Agreements, Environmental Assessments. In coordination with local jurisdictions and to the extent required by Federal law and 25 CFR Part 170, the Tribe agrees to develop appropriate construction easements, maintenance and utility agreements needed for the construction of IRR facilities carried out under this Agreement. The Tribe agrees to perform all environmental and archeological review functions under this Agreement in accordance with 25 CFR Part 170, Section 6002 of SAFETEA-LU, codified at 23 U.S.C. § 139, and other applicable laws.

F. Construction.

1) In accordance with the FHWA-approved IRR-TIP, the Tribe agrees to initiate and complete IRR construction projects in accordance with the approved PS&E and any Tribally-approved change orders and shall periodically ensure that construction engineering is performed according to applicable FHWA, BIA or Tribal standards which meet or exceed federal standards.

2) The Tribe agrees to expend IRR Program funds on:

(a) program and administrative expenses authorized under:

- (i) this Agreement;
- (ii) 25 CFR Part 170, as amended by SAFETEA-LU;
- (iii) OMB Circular A-87 (codified in 2 CFR); or
- (iv) other applicable law; and

(b) construction activities on projects that are listed on an FHWA-approved IRRTIP.

⁴ The Parties agree that these procedures establish no precedent for future agreements with this Tribe or any other Indian tribe, nor waives any rights of the Parties.

3) Once an IRR construction project is completed, the Tribe will prepare for the Administrator a final construction report and as-built plans for final inspection in accordance with 25 CFR Part 170.

4) The Tribe agrees to allow FHWA Officials or by mutual agreement, a delegated representative of FHWA, the opportunity to visit project sites on a monthly basis or at critical project milestones, provided that FHWA gives the Tribe reasonable advance written notice. These visits are intended to allow FHWA to carry out its oversight and stewardship responsibilities for the IRR Program or project(s) assumed by the Tribe under this Agreement. FHWA will not provide direction or instruction to the Tribe's contractor or any subcontractor at any time.

G. Reporting Requirements. The Tribe shall provide the Administrator a courtesy copy of its annual single agency audit report; semi-annual progress reports which contain a narrative of the work accomplished; and semi-annual financial status reports using an SF425- Federal Financial or such similar form as is used by the DOT. The Tribe shall provide the Administrator the semi-annual reports within ninety (90) days following the conclusion of the reporting period, which shall run from October 1 to March 31 and from April 1 to September 30.

ARTICLE IV – RESPONSIBILITIES OF THE ADMINISTRATOR

Section 1. Provision of Funds. The Administrator shall provide funds pursuant to the RFA to the Tribe to carry out this Agreement in accordance with Article II, Section 2 of this Agreement.

Section 2. Authorize Project Work. The Administrator authorizes the Tribe to carry out preliminary engineering, construction engineering, development of management systems, construction, and maintenance of the programs and projects carried out by the Tribe under this Agreement for PFSAs and projects/facilities included on an FHWA-approved IRR TIP in accordance with the approved PS&E packages, this Agreement, and applicable laws and regulations.

Section 3. Coordination with BIA.

A. The Administrator shall coordinate with the Bureau of Indian Affairs (BIA) concerning transportation functions and activities delegated by law to that agency to aide the Tribe in the proper and efficient administration of the PFSAs performed by the Tribe under this Agreement.

B. The Administrator will encourage a representative of the BIA, with knowledge of the IRR Program, to meet at least annually with a designee of the Tribe and the Administrator to review their respective duties and obligations under SAFETEA-LU, the IRR Program, applicable regulations, and this Agreement with the goal of identifying actions which the Tribe, the Administrator and the BIA can take to ensure the Tribe's successful administration of the transportation PFSAs carried out under this Agreement.

Section 4. Coordination with Public Authorities. The Administrator, or his authorized FHWA representative, upon the Tribe's request, shall coordinate with representatives of a public authority to assist the Tribe during the public authority's review of a PS&E package or final inspection of a completed project to ensure that the public authority's input during the review and comment period, or during the final inspection does not interfere with the Tribe's efficient administration of projects performed under this Agreement.

Section 5. Designated Officials. All notices, proposed amendments, and other written correspondence between the Parties shall be submitted to the following officials:

To the Tribe:

Chairman/President
 (INSERT NAME OF TRIBE)
 (INSERT ADDRESS)

With a copy to:

Tribal Transportation Director
 (INSERT NAME OF TRIBE)
 (INSERT ADDRESS)

To the FHWA:

Associate Administrator
 Federal Lands Highways (HFL-1)
 U.S. Department of Transportation
 1200 New Jersey Ave, SE, Room E61-316
 Washington, D.C. 20590

With a copy to:

Indian Reservation Roads Program Manager
 (HFPD-1)
 Federal Highway Administration
 U.S. Department of Transportation
 1200 New Jersey Ave, SE, Room E61-311
 Washington, D.C. 20590

Section 6. Federal Construction Standards. The Administrator may provide information about Federal construction standards as early as possible in the construction process. If Tribal construction standards are consistent with or exceed applicable federal standards, the Tribe's proposed standards will be accepted. The Administrator may also accept commonly used industry construction standards, including design and construction standards adopted by the State of (INSERT STATE LOCATION).

Section 7. Joint Inspection. The Administrator shall conduct the final project inspection jointly with the Tribe and facility owner and shall concur in the BIA's acceptance of the construction project or activity for the purpose of including the completed project in the BIA's IRR Program Inventory.

Section 8. Technical Assistance. Upon the request of the Tribe and subject to the availability of funds, the Administrator shall provide or make available technical assistance to the Tribe to aide the Tribe in carrying out its responsibilities under this Agreement.

Section 9. Reporting. The Administrator shall provide the Tribe with semi-annual reports on program matters of common concern to the parties. The times for these reports are identical to those set out in Article III, Section 1(G).

Section 10. Notice of Additional Funds. If the Administrator receives notice of the availability of additional funding for any purpose authorized under this Agreement, including the availability of unspent IRR Program funds, the Administrator shall promptly notify the Tribe regarding such funding so that the Tribe may apply for any funds they may be eligible to receive on the same basis as any other Indian tribe.

ARTICLE V – OTHER PROVISIONS

Section 1. Eligibility for Additional Funding and Services. The Tribe shall be eligible, under this Agreement, to receive additional IRR Program funds on the same basis as other Indian tribes according to the Tribal Transportation Allocation Methodology (TTAM) set forth in 25 CFR Part 170, as well as other funds of the DOT, not included in this Agreement, which are available to Tribe on a competitive, formula, or other basis, including non-recurring funding such as High Priority Project funding, and Congressional earmarks such as Public Lands Highways Discretionary grants. Whenever there are errors in calculations or other mistakes regarding estimates of available funding which may need to be renegotiated, both Parties agree to take action as necessary to correct such errors.

Section 2. Access to Data Available to the Administrator to Administer the Program. The Tribe is administering a federal program under the authority of SAFETEA-LU, in accordance with the ISDEAA, and by resolution of the Tribal government. In order for the Tribe to carry out this program effectively and without diminishment of federal services to program beneficiaries, and consistent with this Agreement, the Administrator

shall provide the Tribe with all releasable data and information necessary to carry out the PFSAs assumed by the Tribe under this Agreement.

Section 3. Sovereign Immunity. Nothing in this Agreement shall be construed as—

- (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by the Tribe; or
- (2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

Section 4. Trust Responsibility. Nothing in this Agreement shall absolve the United States from any responsibility to individual Indians and the Tribe, including responsibilities derived from the trust relationship and any treaty, executive order, or agreement between the United States and the Tribe.

Section 5. Federal Tort Claims Act/Insurance. In accordance with the provisions of Pub.L. 101-512, Title III, § 314, 104 Stat. 1959, as amended Pub.L. 103-138, Title III, § 308, 107 Stat. 1416 (25 U.S.C. § 450f, note), for purposes of Federal Tort Claims Act coverage under this Agreement, the Tribe and its employees are deemed to be employees of the Federal government while performing work under this Agreement. This status is not changed by the source of the funds used by the Tribe to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Tribe. The Tribe is also authorized to use the funds provided under this Agreement to purchase such insurance coverage as may be necessary and prudent, in the determination of the Tribe. In full recognition of and without undermining the federal tort claims protection provided in this section, the Parties understand and agree that prudent project management requires that Tribal contractors purchase adequate workers compensation, auto and general liability insurance when completing construction projects funded under this Agreement. Accordingly, the Tribe shall include in any construction contracts entered into with funds provided under this Agreement a requirement that Tribal contractors maintain workers compensation, auto and general liability insurance coverage consistent with statutory minimums and local construction industry standards. The Parties understand and agree that this insurance requirement does not apply to the Tribe itself.

Section 6. Indian and Tribal Preference.

A. Federal law gives hiring and training preferences, to the greatest extent feasible, to Indians for all work performed under the IRR Program. Under 25 U.S.C. § 450e(b) and 23 U.S.C. § 204(e), Indian organizations and Indian-owned economic enterprises are entitled to a preference, to the greatest extent feasible, in the award of contracts, subcontracts, and sub-grants for all work performed under the IRR Program.

B. The Tribe's employment rights and contracting preference laws, including tribal preference laws, apply to this Agreement.

Section 7. Severability. Should any portion or provision of this Agreement be held invalid, it is the intent of the Parties that the remaining portions or provisions thereof continue in full force and effect.

Section 8. Termination of the Agreement. On the date of the termination of the Agreement by the Tribe as authorized under 23 U.S.C. § 202(d)(5), as amended by section 1119(g)(4) of SAFETEA-LU, or if the Administrator makes a specific written finding and provides notice to the Tribe in accordance with this Agreement that the Tribe is no longer eligible to receive funding under this section as authorized under section 1119(g)(4) of SAFETEA-LU, the Administrator shall allocate the funds that would have been provided to the Tribe under the Agreement to the Secretary of the Interior to provide continued transportation services in accordance with applicable law; provided however, that if the Tribe disputes the Administrator's eligibility determination, the Parties may utilize the dispute remedies available under Article II, Section 4 herein, and the Administrator shall suspend any decision to transfer funds to the Secretary of the Interior pending the outcome of the dispute. At the Tribe's election, the Tribe may perform such functions, services and activities as it chooses to include in an ISDEAA contract or agreement to be entered into with the Secretary of the Interior upon the termination of this Agreement.

Section 9. (INSERT ANY SPECIAL CONDITIONS/ISSUES, OTHERWISE DELETE)

Section 10. Amendments. Any modification of this Agreement shall be in the form of a written amendment and shall require the signed agreement of a duly authorized representative of the Tribe and the Administrator. The Parties agree to work together in good faith, following the implementation of this Agreement, to identify additional issues or matters that should be addressed in this Agreement subject to the Parties' mutual written consent.

Section 11. Good Faith. The Parties agree to exercise the utmost good faith in the implementation and interpretation of this Agreement and agree to consider and negotiate such additional provisions as may be required to improve the delivery and cost-effectiveness of transportation services.

Section 12. Successor Agreements.

A. Indian Reservation Roads Program Agreement. No later than six months prior to the expiration of this Agreement, the Parties shall commence negotiation of a successor Indian Reservation Roads Program Agreement. It is the intent of the Parties to have a successor Agreement in place to run concurrent with the highway reauthorization legislation which succeeds SAFETEA-LU.

B. Referenced Funding Agreement. Ninety (90) days before the expiration of each year's RFA, the Parties shall commence negotiation of the subsequent year's RFA.

(INSERT NAME OF TRIBE)

**U.S. Department of Transportation
Federal Highway Administration**

By _____

By _____

**(INSERT NAME OF SIGNATORY)
(INSERT TITLE)**

John R. Baxter, P.E., Associate Administrator
Office of Federal Lands Highway

Date

Date

Example 3.2 - Tribal Resolution

XYX Tribe
P. O. Box 123
City, State Zip Code
Ph: (xxx) xxx-xxxx
Email: xyz@aol.com
www.xyz.org

RESOLUTION: 11-06

Approving the Tribe's Assumption of Transportation Functions under SAFETEA-LU and Approving the Issuance of a Notice of Intent to FHWA and BIA

WHEREAS, XYZ Council is the governing body of the XYZ Tribe, a federally recognized Native Tribe; and

WHEREAS, the XYZ Council is empowered, under Article V, Sections I, II, III of the Tribal Constitution, to negotiate with Federal, State, and local governments, and others on behalf of the Tribe, to advise and consult with the representatives of the Departments of federal agencies on all activities that may affect the Tribe; and

WHEREAS, the XYZ Council finds that transportation infrastructure is vital to the future economic prosperity of Tribal members living in or near the XYZ Tribe; and

WHEREAS, the XYZ Council finds that rebuilding roads and bridges on, or which provide access to XYZ Tribe improves the safety and security of Tribal members and nonmembers who live or work in the XYZ Tribe, and renews the sense of pride that all members have for our Tribe; and

WHEREAS, the Congress passed and the President signed the highway reauthorization SAFETEA-LU, the Safe, Affordable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users, Public Law No. 109-59, 119 Stat. 1144 (2005); and

WHEREAS, SAFETEA-LU increases Tribal opportunities in the administration and development of Tribal transportation programs and authorizes the Secretary of Transportation to contract directly with Native Tribes to assume the responsibilities of and the associated funding for the Indian Reservation Roads (IRR) Program serving a Tribe; and

WHEREAS, 23 U.S.C. § 202(d)(5), as amended by Section III9(g)(4) of SAFETEA-LU, provides that an Native tribal government may carry out any IRR Program or project through a contract or agreement with the Secretary of Transportation in accordance with the Native Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and further provides that the Tribal government may assume "all functions and duties that the Secretary of the Interior would have performed" for the benefit of the Tribal government, with the exception of certain inherent federal functions; and

WHEREAS, the Tribe believes that establishing a comprehensive transportation program for the Tribe will further the long-term interests of the Tribe, afford the Tribe greater flexibility and control to prioritize transportation needs for the Tribe, and permit the Tribe to utilize flexible financing arrangements available by law to speed the development of transportation infrastructure in Native Village XYX; and

WHEREAS, the XYX Council desires to assume the Secretary of the Interior's duties and functions with respect to the IRR Program serving the Native Village of XYX and such other Tribal transportation programs- as may be appropriate under 23 U.S.C. § 202(d)(S), as amended by Section 1119(g)(4) of SAFETEA-LU; and

WHEREAS, the Tribal Transportation Department possesses the financial stability and management capability required by section 1119(g)(4) of SAFETEA-LU, and possesses the expertise and experience to assume the Secretary of the Interior's responsibilities in the area of transportation planning, design, construction and maintenance;

NOW, THEREFORE BE IT RESOLVED, that the XYX Council does hereby approve the Tribe issuing a Notice of Intent to the Secretary of the Interior and the Administrator of the Federal Highways Administration to assume the transportation duties of the Secretary of the Interior under the IRR Program, together with transportation-related activities for the Native Village of XYZ, and instructs the Tribal President, the Tribal Transportation Services Consultant to take all necessary actions to develop with the Federal Highway Administration a mutually acceptable government-to-government agreement to administer the IRR Program serving the Village; and

BE IT FURTHER RESOLVED, that the Tribal President is hereby authorized and instructed to sign this Resolution and all necessary agreements and contracts for and on behalf of the Tribe in order to establish and assume the transportation duties of the Secretary of the Interior serving the Native Village XYZ.

CERTIFICATION

The XYZ Council adopted this resolution numbered 11-06 during a special meeting held on this day the 9th of March 2011 in the Tribal Office with a quorum present.

For 5; Against 0; Abstain 0

Present 5; Absent 0

Dated this 9th day of March 2011

XYX President