

Pre-Decisional Discussion Draft

FAST ACT FACT SHEET

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SUBJECT: Tribal Transportation Program and Tribal Self-Governance

PROBLEM STATEMENT / OVERVIEW

In the Fixing America's Surface Transportation Act (FAST Act), Congress recognized the importance of tribal transportation. The FAST Act mainly keeps the existing structure for Tribal Transportation Planning (TTP) funding, but it also includes a number of provisions sought by a nationwide coalition of tribes and recommended by Caltrans and its Native American Advisory Committee (NAAC). The act includes an upward trajectory in overall funding for the TTP, increases access by tribes to US DOT grant programs, and creates a tribal self-governance program. The FAST Act also requires studies on safety in Indian Country that may involve participation by the State.

RECOMMENDATIONS FOR IMPLEMENTATION

Effective Methods for Entering Into Agreements with Tribal Governments

The tribal self-governance program and the additional opportunities for tribal governments to participate in grant programs included in the FAST Act may mean that more direct partnerships form between tribal governments and state governments as tribes seek to undertake their own projects. As a result, Caltrans needs to be more efficient when entering into contracts or transferring discretionary funds to tribes directly. Current procedures are time consuming and often require extensive legal review, and in some cases, there are not mechanisms in place to make transfers to tribes who have been awarded discretionary program funds. More comprehensive and efficient processes are needed.

Short-Range Action: Caltrans is currently developing a template for Interagency Fund Transfer Agreements using the 23 U.S.C. Section 202(a)(9) process. The Department needs work with affected tribes, FHWA, and BIA to finalize this template so that it can be standardized and used as a model for future fund transfers. Once it is standardized, this process has the potential to speed the currently lengthy process of awarding funds to tribes. Caltrans may wish to educate project managers for discretionary grant programs so they're aware of this new process and have the tools to process fund transfers and enter into agreements more quickly. Doing this will reduce the amount of staff time to complete fund transfer agreements with tribal governments.

A possible long-term action is to propose legislation to amend Section 94 of the California Streets and Highways Code to give Caltrans broad authority to contract directly with tribal governments as needed to perform Caltrans duties. Some activities for which Tribal Governments are deemed eligible to apply for funding through the Department are not statutorily allowed by existing law, and broadening the situations in which Caltrans can enter into contract with tribes would alleviate that problem.

Safety and Data in Indian Country

The FAST Act includes new provisions for tribal data reporting and requires two national studies on tribal safety data. The two reports on safety in Indian Country may require participation by Caltrans staff, and since the first report is due one year after the enactment of the Act, this activity could potentially begin soon. There will be more pressure for the state to integrate tribal data into SWITRS and safety databases so tribes can better access the Highway Safety Improvement Program and other funds. The California Highway Patrol (CHP) is currently working with Tribes in California, including the Rincon Tribe, to create a process for ensuring incidents on tribal lands are documented and entered into SWITRS, and the work they are doing will therefore be more important. Including tribal governments in the development of the next California Strategic Highway Safety Plan and Implementation Plan may also help Caltrans to proactively engage in resolving some of challenges related to safety in Indian Country. Finally, Caltrans should work with NAAC to ensure the Department is involved appropriately in discussions with tribes and other state agencies as protocols are developed for tribal safety data collection and integration into state databases. The amount of time required is currently unclear.

General

The FAST Act offers new opportunities for partnerships with Native American Tribal Governments, and Caltrans should take advantage of those opportunities by remaining engaged with the tribes and with other agencies as they begin the process of implementing changes to the TTP. The increased TTP funding from the FAST Act may also create more opportunities for partnerships as tribes can undertake more projects, and Caltrans should remain open to collaborating on these.

The NAAC is a resource, and the Department should continue to seek advice on effective ways to ensure the state is appropriately involved as the decision-making process takes place. Coordination with FHWA, BIA, and Tribal Governments will be important throughout this process, and early involvement can lead to future success.

Finally, Caltrans should include tribal governments in discussions for legislative implementation to be sure that their unique and necessary perspective is represented.

BACKGROUND

Tribal Transportation Program Funding Levels (Section 1101(a)(3))

Transportation funds have been sorely needed in Indian Country, and the poor conditions of the Tribal roads, bridges and transit systems jeopardize the health, safety, security and economic well-being of Tribal members and the traveling public. The FAST Act provides increased funding for the Tribal Transportation Program and Tribal Transit Program over MAP-21 levels. The FAST Act provides \$465 million in funding (Section 1101(a)(3)) for the Tribal Transportation Program, and annual step increases of \$10 million until 2020 when the program funding will be \$505 million. This represents a \$175 million increase over the life of the Act.

The TTP is one of the few federal funding sources that can be used as a match on state and local transportation projects, and Caltrans has worked with Tribal governments to jointly stretch transportation funds for projects that are beneficial to both local and tribal communities. These funds are distributed to tribes via a complex TTP funding formula, and while only a small portion of those funds come to CA Tribes, any increase in the program allocation positively impacts the ability to meet transportation needs

in the State. Caltrans should continue working in partnership with California Native American Tribes to meet these transportation needs

MAP-21 included a High Priority Program, which authorized \$30 million annually that could be used to fund projects by a tribe whose annual allocation was insufficient to complete its highest priority project or who had an emergency or disaster on their TTP inventory. Funding was allocated to this program for just the first year of MAP-21. The FAST Act does not include this authorization. To determine exactly how this change is likely to impact CA transportation funds, additional research would need to be done.

Self-Governance Program (Sec. 1121)

The FAST Act creates a new tribal self-governance program for the United States Department of Transportation (Sec. 1121). Eligibility requires that a tribe applies and then demonstrates financial stability and the ability to manage the transportation program. Tribes who meet the eligibility requirements under 23 U.S.C., Sec. 207(b) will be able to enter into self-governance compacts and annual funding agreements with DOT, which will allow them to manage their own programs.

In California, transferring funds to tribal governments can be challenging, so Caltrans will need to ensure we have a method for passing discretionary funding through to tribes with self-governance compacts. Current state statute, Section 94(a) of the California Streets and Highways Code, provides narrowly focused authority for Caltrans to enter into contract with tribal governments. This new self-governance program may require the State to enter into agreements with tribes directly more often, so it is imperative to ensure a mechanism for doing so is in place for all instances in which Caltrans would be authorized by the FAST Act to transfer funds to a tribal government.

A relatively new interagency fund transfer process was introduced by MAP-21 and was included in the self-governance section of the FAST Act. This process, described in 23 U.S.C. Section 202(a)(9), allows State and local governments to transfer funds back to the Secretary of Transportation so the funds can be reallocated via a Tribe's TTP. Caltrans is working to finalize the Department's first such interagency fund transfer agreement, and with the addition of this new self-governance program, this method and other methods of working with tribes will be increasingly important.

Data Reporting and Safety Studies in Indian Country (Sec. 1117)

While the overall national trend for fatalities in vehicle crashes is down, fatal crashes on Indian reservations have increased over the last few years, and for a number of reasons, data to support safety improvements on tribal lands is lacking. The FAST Act acknowledges that accidents in Indian Country are underreported and states that without more accurate reporting, it is difficult to fully understand or address the problem. Better reporting would allow Native American Tribes to apply more successfully for safety improvement funding and would allow more appropriate counter-measures to be developed, thus improving safety planning, programming, and project delivery both by Native American Tribes and by state and other government agencies.

In an attempt to collect better data in Indian Country, the FAST Act requires tribes to submit annual reports on projects and activities being performed under the TTP (Sec. 1117(a)). In addition, two reports related to tribal transportation safety are required by the FAST Act:

- 1) A report by The Secretary of Transportation that will examine the quality of data collected by states, counties, and Indian Tribes for transportation systems and the relevance of that data to Native American Tribes. The purpose of this report is to improve the collection and sharing of data and develop data that tribes can use to improve safety on or near their reservations. It also

requires identification of transportation funds provided to tribes by agencies other than the Department of the Interior; assumedly, this includes state Departments of Transportation and may require Caltrans to coordinate and provide information for analysis. Finally, states will be provided with best practices for transitioning to a paperless transportation safety data reporting system that uses data to improve safety on Indian reservations. While states are not mentioned in the list of groups to be consulted, it is possible that Caltrans will be engaged in this process. This effort will likely intersect with the work done by CHP in partnership with California Tribes to improve SWITRS data collection on tribal lands.

- 2) A report by the Secretary of Transportation that will identify and evaluate options for improving safety on public roads on Indian Reservations. This report is to be developed in consultation with states and Indian Tribes, and is due two years after the enactment of the FAST Act. Again, this is likely to require some Caltrans staff time, but how much and in what capacity is currently unknown.

Nationally Significant Federal Lands and Tribal Projects Program (Sec. 1123)

The FAST Act creates a new National Significant Federal Lands and Tribal Projects Program (Section 1123) that will provide up to \$100 million a year in grants for eligible projects including tribal transportation facilities. Tribes are eligible to apply for grants under this program. However, grants under this program are required to have a cost exceeding \$25 million, with priority being given to projects over \$50 million (Sec. 1123(c)(3)). Program funds must be used for construction, reconstruction, or rehab, not for project design. The high dollar threshold for projects and other restrictions, including the prohibition of using TTP funds for the Tribe's cost share, may make this program inaccessible to many CA Tribes whose transportation budgets would not support these requirements.

There appears to be no clear direct involvement by Caltrans in this Nationally Significant Federal Lands and Tribal Projects Program at this time, but significant coordination would be required if a tribe in the state received program funds and wanted to partner with Caltrans or a local agency.

Other FAST Act Provisions that May Impact How Caltrans Does Business with Tribes

- The FAST Act reduces the project management and oversight takedown from the TTP for the Bureau of Indian Affairs and FHWA by one percent, from 6% to 5%, and increases the Tribal Transportation Bridge Program takedown from 2% to 3% (Sec. 1118).
- Tribal transportation facilities were made eligible for emergency reimbursement (Sec. 1107)
- Section 1113 of the FAST Act requires the State to consult with tribes before ceasing to collect data on unpaved roads that are included in the NTTFI, so Caltrans maintenance and traffic operations staff should be aware of this change.
- Finally, the FAST Act expands tribal access to new federal grant programs including the Nationally Significant Freight and Highway Projects (Sec 1105), and tribes are now eligible to access funds through the state through the Surface Transportation Block Grant Program (Sec. 1109). Tribal eligibility should be recognized and accounted for in Caltrans processes

ANALYSIS (PROS/CONS)

Pros – The FAST Act includes more funding for tribes, more flexibility for tribes, and the possibility of better data for tribal transportation projects, which can all lead to increased funding for transportation. There are also new opportunities to partner with tribes on projects or activities that may lead to a safer and better maintained transportation system in the State of California.

Cons- If state does not partner with California Native American Tribes on data, then improved data won't be collected and that could negatively impact the ability to complete improvement projects, but this partnering will require staff time. Also, the tribal self-governance program increases the importance of addressing an existing challenge that Caltrans has when contracting with Tribal Governments. If the Department doesn't develop an easy method for transferring funds or partnering, then there is potential for conflict and for wasted time and money because each agreement could take a great deal of staff time and legal review.

CONCLUSIONS

The FAST Act offers many new opportunities for tribes and states to collaborate with each other. There may be some staff time required to coordinate, but that opportunity should be seized.

Comparison of MAP-21 and FAST Act

Item	MAP-21	FAST Act
Note that references in red are to FAST Act sections; blue references are for United States Code (U.S.C.).		
Funding Levels	<ul style="list-style-type: none"> \$450,000,000 per year in FY 2013 and 2014 (§1101(a)(3)(A) in MAP-21) 	<ul style="list-style-type: none"> \$465 million in FY 2016, \$475 million in FY 2017, \$485 million in FY 2018, \$495 million in FY 2019, \$505 million in FY 2020 (§1101(a)(3)(A)(i) through §1101(a)(3)(A)(v))
Self Governance Program	<ul style="list-style-type: none"> None in MAP-21. Previous §207, an unrelated provision, was repealed. 	<ul style="list-style-type: none"> Adds a tribal self-governance program as a new §207 to 23 U.S.C. (See §1121) Application by tribal council Demonstrates that for the past 3 fiscal years “financial stability and financial management capability, and transportation program management capability.” (207(b)(1)) Compact must be approved (207(c)) Annual funding agreements (207(d)) If a state wants to transfer funds to the tribe, it can use 202(a)(9) or transfer the funds back to the Secretary of Transportation, and then from the Secretary to the Indian tribe. (207(d)(2)(A)(ii)(III)) A state shall not be responsible for constructing or maintaining the project constructed through the fund transfer to the Indian tribe. The tribe will be responsible. (207(d)(2)(A)(ii)(III)) A tribe has the authority to reallocate funds or redesign programs as it sees fit. (207(e)(1)(A)) If a tribe receives a grant from the Secretary of Transportation or funds from a state, the Indian

		<ul style="list-style-type: none"> tribe must use the funds for the purpose originally authorized. (207)(e)(1)(B)) Retrocession – a tribe may retrocede functions and funds to the Secretary that are in a compact. (207)(e)(2)) A compact may be terminated if the Secretary finds a compelling reason, such as threat to environment or safety or gross mismanagement. (207)(f)(2)) Construction standards for projects constructed under a self-governance program shall have standards determined by the secretary (207(i)) Regulation waivers may be granted by the secretary (207(j)(2))
Project Management & Oversight	<ul style="list-style-type: none"> 6 percent authorized (see 23 U.S.C. §202(a)(6) under MAP-21) 	<ul style="list-style-type: none"> 5 percent authorized (§1118, to amend 23 U.S.C. §202(a)(6))
Tribal Transportation Bridge Program	<ul style="list-style-type: none"> 2% (23 U.S.C. §202(d)(2)) 	<ul style="list-style-type: none"> 3% (§1118, to amend 23 U.S.C. §202(d)(2))
Nationally Significant Federal Lands and tribal projects program	<ul style="list-style-type: none"> Not in MAP-21 	<ul style="list-style-type: none"> Tribes eligible for projects. States and local agencies may apply if sponsored by a federal land management agency or tribe. (§1123(a) and (b)) A federal lands transportation facility, a federal lands access transportation facility, and a tribal transportation facility are all eligible. The facility need not be included on the official inventory in section 23 USC §202 or §203 (§1123(e)(1)).

		<ul style="list-style-type: none"> • An eligible facility must have a record of decision under NEPA or otherwise have NEPA clearance (§1123(c)(2)) • Minimum cost of \$25 million, with priority to projects over \$50 million. (§1123(c)(3)) • Funds can only be used for construction, reconstruction, or rehab. The funds cannot be used for project design. (§1123(d)) • Selection criteria include safety, quality of life, economic competitiveness, inclusion in the National Register of Historic Places, innovation, fund source, benefit to several tribes or federal agencies (§1123(f)) • Federal share is 90%. Non-federal share can come from federal funds other than those under Title 23 or 49, U.S.C. (§1123(g)) • \$100 million available in each fiscal year (Sec 1123(h))
Project Data Reporting	<ul style="list-style-type: none"> • Tribal Data Collection programs not in 23 U.S.C. §201(c)(6) 	<ul style="list-style-type: none"> • Within 90 days after the end of Federal Fiscal Year, any entity carrying out anything under §202 must collect the data in 23 U.S.C. 202(c)(6) [TTP] (See §1117(a)) as follows: <ul style="list-style-type: none"> ○ Project names (23 U.S.C. 201(c)(6)(C)(i)) ○ Project description (23 U.S.C. 201(c)(6)(C)(ii)) ○ Current status (23 U.S.C. 201(c)(6)(C)(iii)) ○ Job estimates (23 U.S.C. 201(c)(6)(C)(iv))
Safety Studies on Public Roads in Indian Country	<ul style="list-style-type: none"> • No special safety studies under MAP-21 	<ul style="list-style-type: none"> • Recognizes the safety issues faced by Native Americans (§1117(b)) • Within one year of the passage of the FAST Act, the Secretary of Transportation, after consultation with the Secretaries of Interior, Health and Human Services, the Attorney

		<p>General, and Indian tribes, must submit a report to the Committee on Environment and Public Works and the Committee on Indian Affairs of the Senate and the Committee on Transportation and Infrastructure and the Committee on Natural Resources of the House (§1117(b)(2)(A))</p> <ul style="list-style-type: none"> ○ Report on “quality of transportation safety data collected by States, counties, and Indian tribes for transportation safety systems and the relevance of that data to improving the collection and sharing of data on crashes on Indian reservations.” (§1117(b)(2)(A)) ○ Purposes are to “improve the collection and sharing of data on crashes on Indian reservations” and “develop data that Indian tribes can use to recover damages to tribal property caused by motorists.” (§1117(b)(2)(B)) ○ Develop with States, tribes, and local agencies a system for transitioning to paperless reporting that is specifically for traffic safety on Indian reservations and public roads on Indian reservations (§1117(b)(2)(C)) ○ Safety fund identification for tribes (§1117(b)(2)(D)) <ul style="list-style-type: none"> ● Study on Bureau of Indian Affairs Road Safety <ul style="list-style-type: none"> – Within 2 years, the Secretary will produce in consultation with Secretary of Interior, Attorney General, States, and Tribes a study that
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Tribal Eligibility for Federal Grant Programs	<ul style="list-style-type: none"> ● 49 U.S.C. §5311 does not contain a provision about dividing funds between multiple tribes that provide services in the same Tribal Statistical Area. 	<ul style="list-style-type: none"> ● Changes to Rural Program (§5311) adds that if there is more than one tribe providing transit services to lands in a single Tribal Statistical Area, and “the Indian tribes do not determine how to allocate the funds apportioned under clause (iii) of subparagraph (A) between the Indian tribes, the Secretary shall allocate the funds” according to a formula established in the amendment (See §3007, which will be coded to 49 U.S.C. 5311(j)(1)(E))
Hazardous Planning and Training Grants	<ul style="list-style-type: none"> ● This section creates a training and planning program for States and Tribes on emergency plan, particularly for plan development and personnel training for hazardous waste emergencies. 49 U.S.C. Sec 5116 	<ul style="list-style-type: none"> ● This section of the FAST Act (§7203) makes minor changes to 49 U.S.C. Sec 5116, and these changes are small phrases mentioning Secretary approval, auditing, and past performance. The word “Indian” is added in a few places before the word tribe, and some rearrangement is in the FAST Act text.
Tribal High Priority Projects Program	<ul style="list-style-type: none"> ● \$30 million authorized annually but never actually appropriated 	<ul style="list-style-type: none"> ● Program Canceled
Emergency Relief	<ul style="list-style-type: none"> ● Tribal and federal land roads not eligible for emergency debris relief funds (23 U.S.C. §125(d)(3)) 	<ul style="list-style-type: none"> ● Tribal transportation facilities and federal lands transportation facilities that are open to public travel are eligible for reimbursement. (§1107; to add a new 23 U.S.C. 125(d)(3)(C))
Surface Transportation Block Grant Program	<ul style="list-style-type: none"> ● The surface transportation program has no block grant component (23 U.S.C. §133) 	<ul style="list-style-type: none"> ● There is a Surface Transportation Block Grant Program under the FAST Act (§1109), with tribes as eligible recipients.

Freight	<ul style="list-style-type: none"> No Nationally Significant Freight and Highway Projects Program 	<ul style="list-style-type: none"> A new discretionary grant program for nationally significant freight projects is created, and Indian tribes are eligible applicants for this program. (§1105; to be in 23 U.S.C. §117(c)(1)(G))
Data Collection on Unpaved Roads	<ul style="list-style-type: none"> There is no provision about data collection on Paved Roads as part of the Highway Safety Improvement Program (23 U.S.C. §148) 	<ul style="list-style-type: none"> There is a new section added to U.S.C. to allow states to cease collecting data on unpaved roads on the National Tribal Transportation Facility Inventory as part of the Highway Safety Improvement Program if the state consults with the tribe. (§1113 to be a new 23 U.S.C. §148(k)(1)(B))

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