

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****23 CFR Part 661****[FHWA Docket No. FHWA-98-4743]****RIN 2125-AE57****Indian Reservation Roads Bridge Program****AGENCY:** Federal Highway Administration (FHWA), DOT.**ACTION:** Final rule.

SUMMARY: The FHWA adopts as final an interim final rule that establishes the regulation on the Indian reservation road bridge program (IRRB). The purpose of adopting the interim final rule as final is to establish a nationwide priority program for improving deficient Indian reservation road (IRR) bridges as required by the Transportation Equity Act for the 21st Century (TEA-21). This final rule also establishes the project selection and fund allocation procedures to ensure the uniform application of this IRRBP.

EFFECTIVE DATE(S): June 9, 2003.

FOR FURTHER INFORMATION CONTACT: Mr. Wade F. Casey, P.E., Federal Lands Highway (HFPD-9), (202) 366-9486, or Ms. Vivian Philbin, Office of the Chief Counsel (HCC-40), (303) 716-2122. Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Electronic Access**

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

Background

The FHWA published an interim final rule on part 661 on July 19, 1999, at 64 FR 38565. Interested persons were invited to submit comments to FHWA

Docket No. FHWA-98-4743. The interim final rule established the nationwide priority program for improving deficient Indian reservation road bridges as required by section 1115 of the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178; 112 Stat. 107; June 1998). The interim final rule also established the project selection and fund allocation procedures to ensure uniform application of the program and distribution of the funds associated with this program. The interim final rule has been in effect since July 19, 1999.

Section 1115 of TEA-21 required the Secretary of Transportation (hereinafter Secretary) to establish a nationwide priority program for improving deficient IRR bridges. This legislation also required the Secretary, in cooperation with the Secretary of the Interior, to reserve not less than \$13 million for projects to replace, rehabilitate, seismically retrofit, paint, apply calcium magnesium acetate to, apply sodium acetate/formate or other environmentally acceptable, minimally corrosive anti-icing and de-icing compositions or install scour countermeasures for deficient IRR bridges, including multiple-pipe culverts. In order to immediately implement the IRRBP and promptly address the deficient IRR bridges, the FHWA, in conjunction with the Bureau of Indian Affairs (BIA) and in consultation with the Indian tribal governments (ITGs) and other interested parties, developed project selection and fund allocation procedures and issued an interim final rule.

Before issuing a final rule for the IRRBP, we indicated that we would invite and actively consider comments introduced concerning the IRRBP interim final rule and that we would assess how the IRRBP is working, including the fund allocation process based on experience with these rules.

Summary of Comments

Since publication of the interim final rule, the FHWA received 5 comments to the docket, one from a tribal chairman, one from a tribal member, one from the BIA Pacific Regional Office, one from a private citizen and one from the TEA-21 Negotiated Rulemaking Tribal Caucus.

The tribal chairman was concerned that the IRRBP is funded as a \$13 million set-aside from the IRR construction program; that the program would be a detriment to tribes in Oklahoma; that the bulk of deficient IRR bridges are in Oklahoma and that there is a need to place bridges on low water crossings.

The individual tribal member who commented was also from Oklahoma and stated that the interim final rule is non-compliant with the Civil Rights Act; it creates two classes of Indian people, those living on reservations and those that do not; and limits the use of program funds by non-BIA owned IRR bridges that serve non-reservation tribes such as those in Oklahoma.

The BIA Pacific Region was concerned that tribal bridge owners would not be able to provide a 20 percent funding match; that right-of-way should be accepted in the form of a memorandum of agreement (MOA) or memorandum of understanding (MOU) between government agencies; that TEA-21 be amended to provide funding for project planning and design; lastly, that the 120 calendar day award period be amended to 180 calendar days.

The private citizen who commented was concerned about treatment of BIA versus non-BIA owned bridges and that all Indian tribes regardless of location should benefit from this bridge program, even if they reside off the "Indian Reservation."

The tribal caucus of the TEA-21 Negotiated Rulemaking Committee recommended a number of changes to the interim final rule. It disagreed with the 20 percent fund match requirement for non-BIA owned IRR bridges. It also disagreed with the provision that set a \$1.5 million limitation on IRRBP funds for non-BIA owned IRR bridges. In addition, it felt that for structurally deficient IRR bridges with a sufficiency rating of 50 or less, that the BIA should use its 6 percent administrative funds to design replacement bridges. It also recommended that the IRR Coordinating committee be consulted regarding the deficient bridge list.

The FHWA has considered all of the written comments submitted and we are adopting this interim rule as final based on the following discussion:

(a) It is approaching four years since the rules governing the IRRBP have been in place, and ample time has gone by to observe whether the rules are working. Since publication, 69 bridges have been funded for either replacement or rehabilitation for approximately \$35.1 million. Based on a query of bridges in the process of being designed¹, 66 bridge plan, specification and estimates (PS&Es) are slated to be completed in FY 2003 that will require roughly \$39.7 million in IRRBP construction funds. This is a good indication that the IRRBP funds have been fully used during the

¹ Recall that IRRBP funds can not be used until a PS&E is completed. See also 23 U.S.C. 202 (d)(4)(D) and 23 CFR 661.39.

fiscal years (FY) available during TEA-21 (FY 1999–FY 2003) except for \$4.9 million. The \$4.9 million would be available for additional bridge projects in FY 2004 and provide a stop gap measure during the period following TEA-21's expiration at the end of FY 2003 until the reauthorization process is complete. Projecting ahead to FY 2004, 65 additional bridges are planned for PS&E completion that will require roughly \$36.5 million in IRRBP construction funds. Likewise, in FY 2005, 24 bridges are planned for PS&E completion requiring approximately \$9.3 million in IRRBP funds. Based on the current use of the IRRBP funds and the need for additional funds beyond TEA-21, the FHWA has determined that the interim rules are working.

(b) The concern, particularly within Oklahoma, that some Indian tribes would not have access to the IRRBP funds during the fiscal years of TEA-21 is unfounded. To date, 26 percent of the IRRBP funds has been spent on bridges in Oklahoma. Other major beneficiaries of IRRBP funds include Indian tribes within New Mexico (17 percent) and Arizona (9 percent). To date, all eligible bridge projects submitted for processing have been funded.

(c) Two Indian tribes and the TEA-21 Negotiated Rulemaking Tribal Caucus urged that the \$1.5 million limitation be eliminated for non-BIA owned bridges or even simply waived. The FHWA has determined that to remove the \$1.5 million limitation would jeopardize both the IRRBP statute and its legislative history that envisions a national program to address the large number of deficient IRR bridges. This rule does not address Indian people in terms of Reservation status. Rather, the rule identifies two separate classifications of IRR bridges, namely those owned by the BIA and those owned by a State, county or other entity. Based on a recent query of the National Bridge Inventory, out of an inventory of approximately 4,400 IRR bridges there are roughly 1,069 that are deficient. The average age for IRR bridges exceed 40 years and as the IRR bridge infrastructure's becomes older the propensity to become deficient increases. If the \$1.5 million limitation were removed for non-BIA owned IRR bridges, it would jeopardize the funding for the 66 bridges that are currently undergoing or completing bridge PS&E's this year and would greatly limit the number of deficient IRR bridges (both BIA-owned and non-BIA owned) which could be funded for replacement or rehabilitation in the future. Finally, 23 U.S.C. 204(c) requires that IRR funds be supplemental to and not in lieu of other funds appropriated to the States. The

States currently have access to Surface Transportation Program funds and Highway Bridge Replacement and Rehabilitation funds that can be used on deficient non-BIA owned IRR bridges. Removal of the matching requirement and funding cap would contravene the statutory intent by allowing non-BIA owned IRR bridges to be fully funded with IRR funds.

Conclusion

For the reasons stated above, the FHWA adopts as a final rule the interim final rule published on July 19, 1999, at 64 FR 38565.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or the U.S. Department of Transportation regulatory policies and procedures. The economic impact of this rule will be minimal. This action merely adopts as final the interim final rule that has been in effect since July 19, 1999.

This final rule will not adversely affect, in a material way, any sector of the economy. In addition, this final rule will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs as this action just continues what has been in effect since 1999.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this final rule on small entities including Indian tribal governments (ITGs) and local governments and has determined it will not have a significant economic impact on a substantial number of small entities. The funding available to ITGs under the IRRBP has a beneficial economic impact by contributing to replacement and or rehabilitation of deficient IRR bridges. These bridges are vital to the transportation infrastructure and economic development on Indian reservations. By replacing or rehabilitating deficient IRR bridges the IRRBP is key to enhancing transportation and the movement of goods and services in Indian country.

Unfunded Mandates Reform Act of 1995

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L.

104–4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year.

Additionally, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Indian tribal governments (ITGs) have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The IRRBP permits this type of flexibility to the ITGs.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA also determined that this action does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway planning and construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of environment.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000. The FHWA has determined that participation in the IRRBP by the ITGs is optional, however; it is advantageous to the ITG to participate since the program provides bridge construction and construction monitoring funds for eliminating existing deficient IRR bridges. The ITG

