

The FAST Act:

*New Department of Transportation
Tribal Self-Governance Program and
Tribal Transportation Provisions*

Self-Governance Communication and Education
(SGCE)

Hobbs, Straus, Dean & Walker, LLP
January 11, 2016

FAST Act: Introduction

- The Fixing America's Surface Transportation Act (FAST Act) was enacted on December 4, 2015 as PL 114-94.
- It is a 5 year surface transportation authorization which:
 - Extends Self-Governance to the Department of Transportation;
 - Increases funding for the Tribal Transportation and Tribal Transit Programs;
 - Establishes a new grant program for “nationally significant” federal lands and tribal transportation projects; and
 - Addresses other tribal transportation matters.

Webinar Outline and Objectives

- Provide an overview of federal transportation programs and funding
- Summarize tribal transportation elements and funding levels from the FAST Act
- Provide orientation to key concepts in the extension of SG to DOT
- Explore next steps in the implementation of the SG extension

The FAST Act and Federal Investment in Transportation Infrastructure

- Legislation reauthorizes Surface Transportation Programs and Funding
- Funding Mechanism: Federal Highway Trust Fund
- Revenue Source: Federal Gas Tax
- History of Inequity: Funding to State DOTs, Tribes Left Out until recently

The FAST Act and Federal Investment in Transportation Infrastructure

- 1998 – TEA-21 – Shift In Approach
 - All Tribes Eligible for Roads Program and ISDEAA Applies to Roads Program
 - Negotiated Rulemaking on Funding Formula and Program Rules
- 2005 – SAFETEA-LU - Momentum Accelerates
 - Significant Funding Increases for tribes
 - Broadening of tribal access to Program Authority
 - Expansion of Tribal Authority and Flexibility (ISDEAA extended to FHWA)

ARRA, MAP-21 and FAST Act

- ARRA - Significant Infusion of Federal Funding
 - Tribes Demonstrate Capacity
 - ARRA Introduces New Oversight Requirements
- MAP-21 – The Numbers Look the Same
 - But Overall Funding to tribes Decreased
 - Tribes Chasing Dollars and Agreements
 - Competitive Grants for Safety Program, TIGER
 - Multiple agreements: TTP; FTA, Others
- FAST Act – Streamlining and Accountability

FAST Act: Overview

- Five-year surface transportation authorization which:
 - Extends Self-Governance to the Department of Transportation;
 - Increases funding for the Tribal Transportation and Tribal Transit Programs;
 - Establishes a new grant program for “nationally significant” federal lands and tribal transportation projects; and
 - Addresses other tribal transportation matters.

Tribal Transportation Program (TTP)

The **FAST Act** provides an initial \$15 million increase above the MAP-21 funding level with a \$10 million increase each fiscal year thereafter. (Sec. 1101)

FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
\$450 million	\$465 million	\$475 million	\$485 million	\$495 million	\$505 million

Bridge Set Aside from TTP

The FAST Act increases the funding set aside for the Tribal Transportation Facility Bridges program from 2 % (under MAP-21) to 3 %. (Sec. 1118)

PM & O Takedown from TTP

The FAST Act reduces the Program Management and Oversight (PM&O) takedown for the administrative expenses of BIA and the Federal Highway Administration from 6 % (MAP-21) to 5 %. (Sec. 1118)

New TTP Data Collection and Reporting Requirements

The FAST Act requires tribes to report the name, description, and status of projects and activities carried out the preceding fiscal year with their TTP funds as well as an estimate of the number of jobs created and retained by these projects and activities.
(Sec.1117)

Tribal Transit Program

- The **FAST Act** provides an initial \$5 million increase above the MAP-21 funding level to the formula part of the Tribal Transit program.
- The discretionary amount remains the same as the MAP-21 level. (Sec. 3007)

FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
\$25 million	\$30 million	\$30 million	\$30 million	\$30 million	\$30 million
\$5 million	\$5 million	\$5 million	\$5 million	\$5 million	\$5 million

High Priority Projects Program

- Under MAP-21, the Tribal High Priority Projects program (which provided funds to tribes with insufficient formula funding to construct their priority transportation projects) was changed to become a stand-alone program subject to the yearly appropriations process.
- No funds were ever appropriated for it under MAP-21. The FAST Act did not reauthorize it.

Nationally Significant Projects Program

- The FAST Act authorizes a new \$100 million per fiscal year grant program to construct, reconstruct, or rehabilitate “nationally significant” Federal Lands and tribal transportation projects.
- Funding for this new grant program will be subject to the yearly appropriations process. (Sec. 1123)

Nationally Significant Projects Program

- Eligible projects must have an estimated cost of no less than \$25 million. A higher priority will be given to projects with an estimated cost of \$50 million or more.
- The federal cost share is up to 90 %. A higher priority will be given to projects with a greater local match percentage.

Safety

- No new funding for tribal transportation safety programs
- Requires the Secretary of DOT to provide two tribal transportation safety reports to Congress. (Sec. 1117)
 - 1: How To Improve Tribal Government Transportation Safety Data
 - 2: Options to improve safety on public roads on Indian reservations.

Tribal Transportation Self-Governance Program

- The FAST Act requires DOT to establish a tribal transportation self-governance program modeled largely on Title V of the ISDEAA. It will extend to all programs available to tribes within the DOT (e.g., it will allow tribes to include TTP funding, transit funding, discretionary grant funds, and federal-aid funds transferred by a state agency in their funding agreements).
- The FAST Act requires the development of regulations pursuant to a negotiated rulemaking process, thus providing tribes an opportunity to shape the program's implementing regulations. (Sec. 1121)

Establishment

“... the Secretary shall establish and carry out a program to be known as the tribal transportation self-governance program.”

Eligibility

- Tribe shall be eligible to participate if they:
(1) request participation by resolution or other official action by the governing body of the tribe; (2) demonstrate financial stability and financial management capacity for the past three years, and
(3) demonstrate transportation program management capacity.

Eligibility

Criteria:

- For determining financial stability and financial management capacity:
 - No uncorrected significant and material audit exceptions in the annual audit of self-determination contracts or funding agreements. (3 fiscal years)
- For determining transportation program management capability:
 - Demonstrate transportation program management capability, including the capability to manage and complete projects eligible under this title and projects eligible under chapter 53 of title 49.

Compacts

- Shall be negotiated and entered into with the Secretary of DOT at the request of an eligible Indian tribe;
- Shall set forth the general terms of the government-to-government relationship between the federal government and the tribe, including terms that will continue to apply in future fiscal years (indefinite term); and
- May only be amended by mutual agreement of the tribe and the Secretary.

Annual Funding Agreements

- Funding Agreement Required
- Type of Funding that can be Included:
 - Formula Funding and Discretionary Grants
 - Transfers of State Funds
 - Administration of Tribal Shares
 - Flexible and Innovative Financing
 - Full tribal share funding
 - Tribal transit formula funding
 - Discretionary and competitive grant funding from DOT grant programs available to tribes

Annual Funding Agreements

- Types of Funding:
 - Transfers of State Funds
 - Federal-aid funds apportioned to a state, if the state elects to provide them to the tribe
 - Method for transfer:
 - In accordance with section 202(a)(9); or
 - State transfers funds back to Secretary and the Secretary shall transfer the funds to the tribe
 - Responsibility for Transferred Funds
 - State shall not be responsible for constructing or maintaining project, or for administering or supervising the project or funds
 - Tribe shall be responsible for constructing or maintaining project, or for administering or supervising the project or funds

Annual Funding Agreements

- Types of Funding:
 - Administration of Tribal Shares
 - Shall be provided without regard to the agency or office of the Department within which PSFA is performed
 - Flexible and Innovative Financing
 - Provided that the provisions are agreed upon by the tribe and the Secretary
 - Secretary may issue regulations to establish terms and conditions.
 - If the Secretary does not issue regulations, the terms and conditions must remain consistent with section 202(b)(7), section 202(d)(5), and 25 CFR 170.

Annual Funding Agreements

General Provisions

- Scope of Programs (PSFAs)
 - Funding Agreements must set forth terms that generally identify PSFAs to be performed and administered.
 - For those PSFAs identified, funding agreements must provide (1) general budget category assigned, (2) the funds to be provided, (3) the time and method of transfer of the funds, (4) responsibilities of the Secretary and tribe, and (5) any other provision agreed to by the parties.

- Subsequent Funding Agreements
 - Each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.
 - Terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

Annual Funding Agreements

General Provisions

- Tribes may redesign and consolidate PSFAs and portions thereof included in a funding agreement in any manner that the tribe considers to be in the best interest of the Indian community being served.
 - Exception for discretionary or competitive grants or state apportioned funds. In this case, the tribe shall use the funds for the purpose of which the funds were originally authorized.
- Consent of Tribe required
 - Secretary shall not revise, amend or require additional terms in a new or subsequent FA without the consent of the tribe unless such terms are required by Federal law.

Annual Funding Agreements

General Provisions

- Retrocession: Tribe may retrocede PSFAs (fully or partially) to the Secretary
- Reassumption: the Secretary may:
 - Reassume the remaining funding associated with the retroceded PSFAs
 - Transfer funds associated with DOI PSFAs to the Secretary to carry out transportation services provided by the Secretary.
 - Distribute funds in accordance with applicable law.
- Effective Date: Either the timeframe specified by the parties in the compact or funding agreement OR (1) the earlier of 1 year after the date of submission of the request or the date on which the funding agreement expires, (2) such date mutually agreed upon by the parties.

Provisions Relating to the Secretary

- A decision that relates to an appeal of the rejection of a **final offer** by the Department shall be made by an official of the Department who holds a higher position than the original decisionmaker in the Department , or by an administrative law judge.
- A compact or funding agreement shall include a provision authorizing the Secretary of DOT to terminate the agreement in certain defined instances: imminent jeopardy to a trust asset, natural resources, or public health and safety, or gross mismanagement of funds.
 - Immediate termination v. termination with notice

Provisions Relating to the Secretary

- **Prohibition:** The Secretary shall not terminate a compact or funding agreement (or portion thereof) unless:
 - Secretary has first provided written notice and a hearing on the record; and
 - Tribe has not taken corrective action to remedy
- **Exception:** the Secretary may immediately terminate if:
 - The Secretary makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and
 - The jeopardy arises out of a failure to carry out the compact or funding agreement.

Provisions Relating to the Secretary

- Hearing: Secretary shall provide Tribe with a Hearing on the record not later than 10 days after the date of such termination.
- Burden of Proof:
 - The Secretary shall have the burden of proof in demonstrating by clear and convincing evidence the validity of the grounds for termination.

Cost Principles

- Tribes shall apply cost principles under the applicable OMB circular (except as modified by section 106 of the ISDEAA).
- No other audit or accounting standards shall be required by the Secretary.

Transfer of Funds

- Secretary shall provide funds to the tribe in an amount equal to:
 - The sum of the funding that the tribe would otherwise receive for the PFSA in accordance with the funding formula or other allocation method; and
 - Such additional amounts as the Secretary determines equal the amounts that would have been withheld for costs of the BIA for administration of the program or project.

Construction Programs

- Construction projects carried out shall be constructed pursuant to the construction program standards set forth in applicable regulations or as specifically approved by the Secretary.
- Construction programs shall be monitored by the Secretary in accordance with applicable regulations.

Secretarial Interpretation & Waiver Authority

- The Secretary shall interpret all federal laws, Executive orders, and regulations in a manner that will facilitate: the inclusion of PFSA's (or portions thereof) and associated funds in compacts and funding agreements; and the implementation of the compacts and funding agreements.
- Indian tribes may request that the Secretary waive the application of a regulation promulgated under this section. The Secretary has 90 days to approve or deny the request before it is deemed approved. The Secretary shall review any application by a tribe for a waiver "bearing in mind increasing opportunities for using flexible policy approaches at the Indian tribal level."
- If the application for a waiver is not granted, the agency shall provide the applicant with reasons for the denial.

Disclaimers

The Secretary shall, upon the election of an Indian tribe:

- Maintain current tribal transportation program funding agreements and program agreements; or
- Enter into new agreements.

Applicability of other ISDEAA provisions

- Specific provisions of Title I and V of the Indian Self Determination and Education Assistance Act apply to compacts and funding agreements.
 - Mandatory v. Discretionary Application
- Includes specific definitions, and the definitions set forth in sections 4 and 505 of the ISDEAA.

Regulations

- The FAST Act requires DOT to begin a negotiated rulemaking process by March 4, 2016, to draft regulations to implement the DOT Tribal Self-Governance Program.
- Proposed regulations must be published in the Federal Register within 21 months (September 2017).
- The process must be completed within 30 months (June 2018).
- These deadlines may be extended up to 180 days if the negotiated rulemaking committee requests.
- We recommend that tribes treat the negotiated rulemaking as a priority in order to ensure that the program regulations are beneficial to tribal governments.

Regulations

- The committee will be made up of tribal and federal representatives, but will be composed primarily of tribally-nominated representatives .
 - Participating tribes must have funding agreements under this title.
- The lack of promulgated regulations shall not limit the effect of this section.
- The participating Tribes shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Department, except regulations promulgated under this section.
- It is critical that tribes intending to use the DOT Tribal Self-Governance Program be involved in drafting the rules for the program.

Questions and Discussion