



COALITION OF LARGE TRIBES

Blackfeet Tribe of Montana / Cheyenne River Sioux Tribe / Crow Tribe / Mandan, Hidatsa and Arikara Nations / Oglala Sioux Tribe / Navajo Nation / Rosebud Sioux Tribe / Shoshone-Bannock Tribe / Sisseton Wahpeton Sioux Tribe / Spokane Tribe / Ute Indian Tribe

April 27, 2020

Ms. Tara Sweeney
Assistant Secretary-Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
MS-4660-MIB
Washington, DC 20240

Mr. LeRoy Gishi
Division of Transportation
Office of Indian Services
Bureau of Indian Affairs
1849 C Street, N.W.
MS-4660-MIB
Washington, DC 20240

Re: Rescission of March 30, 2020 Final Rule Regarding 25 CFR 170.443

Dear Ms. Sweeney and Mr. Gishi:

On behalf of the Coalition of Large Tribes (COLT) and as Chairman of the Three Affiliated Tribes I am writing to express our collective opposition to the implementation of the Final Rule for 25 CFR Part 170 published on March 30, 2020 regarding changes to 25 CFR §170.443. The action violates the Administrative Procedures Act requirements for promulgating rules, lacks any rationale in policy or law, and constitutes arbitrary and capricious agency rulemaking. We formally ask that the action taken in the March 30, 2020 Federal Register notice be rescinded immediately. We further demand that BIA Division of Transportation fulfil their lawful responsibilities in managing the National Tribal Transportation Field Inventory and remove proposed roads as required by 25 CFR §170.443.

The March 30, 2020 final rule violates Administrative Procedures Act.

The Interim Final Rule published on October 17, 2019 became effective on the date of publication and became a final rule for 25 CFR §170.443 with the force and effect of law. In order to change a final rule the BIA is required to initiate a new rule making procedure with publication of a Proposed Rule with appropriate explanation and opportunity for public comment. Instead, BIA inexplicably and without cause, reversed the October 17 2019 rule with a direct final rule. The March 30, 2020 rule should be declared withdrawn and cancelled immediately on this basis alone.

In addition, in publishing a final rule after the effective date of an existing deadline for administrative action the BIA engaged in unauthorized and illegal retroactive rulemaking. Removal of proposed roads lacking required data/documentation from the NTTFI became binding law upon the BIA Division of Transportation on March 6, 2020. Effective on that date, as a matter of law, those proposed routes no longer exist in the NTTFI. The March 30, 2020 attempt to reach back in time to change the rules for administering the NTTFI is without precedent and disrupts the fair and impartial administration of the Tribal Transportation Program. The March 30, 2020 final rule is moot because the proposed roads at issue are no longer in the NTTFI, effective March 6, 2020, and any attempt to restore them must meet the documentation requirements. Neither the tribes at issue nor BIA have produced the required documentation to legally enter those proposed roads into the NTTFI.

If BIA finds a valid legislative or administrative basis for again changing the legally binding October 17, 2019 rule for 25 CFR §170.443, it must begin the regulatory process anew and publish a proposed rule that begins with the current state of law, that effective March 6, 2020 the proposed roads lacking required documentation are removed from the NTTFI. If BIA finds a valid basis to by rule reinstate those removed proposed road to the NTTFI, BIA must do so. The use of retroactive rulemaking should be rejected as illegal and a sign of improper motive and/or administrative incompetence.

The March 30, 2020 Final Rule Lacks Legislative or Policy Rationale

The existing language and requirements for 25 CFR §170.443 were the result of extensive analysis and negotiation between tribes in the Tribal Transportation Program Coordinating Committee (TTPCC). The TTPCC agreed the 10,000+ miles of proposed roads in the inventory should be supported by supported by specific documentation requirements or be removed from the NTTFI. The basis for this requirement is to provide a rational basis for adding proposed roads into the inventory. There are proposed roads that would cross designated Wilderness Areas that are by law roadless. Others cross land over which the tribe has no ownership or claim and lie outside of the tribes land area. Also, the cost to construct these roads far exceed any reasonable amount of funding the tribe receives or could expect from the Tribal Transportation Program. The TTPCC provision represented tribal consensus that considerations involving constructability and fiscal constraint be required for any proposed roads to exist in the NTTFI. This recommendation by the TTPCC was accepted by the Secretaries of Transportation and Interior and published as a Final Rule on November 7, 2016.

A February 28, 2018 Final Rule published by BIA maintained the policies for constructability and fiscal constraint in 25 CFR §170.443 and only changed the date for mandatory removal of proposed roads that do not meet the standard to November 7, 2019.



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On July 26, 2019 BIA published a Proposed Rule that would delete the documentation requirements for proposed roads to exist in the NTTFI, a significant change to the existing rule that would allow over 10,000 miles of otherwise non-constructible, fiscally un-constrained, and potentially illegal roads to remain in the NTTFI indefinitely. Many tribes submitted comments and presentations at consultation sessions in opposition to this proposed rule. **Importantly, this Proposed Rule never became final.**

On October 17, 2019 BIA published an Interim Final Rule that ignored the July 26, 2019 proposed rule, and again only changed the date for mandatory removal of proposed roads that do not meet the standard to March 6, 2020. This is the current law of the land. March 6, 2020 came, and BIA by law is required to remove any proposed roads that do not have required documentary support out of the NTTFI.

The alleged Final Rule published on March 30, 2020 comes after the proposed roads lacking required documentation were removed by law from the NTTFI. To allow retroactive reinstatement of these proposed roads into the NTTFI is a major rule change that will require publication of a proposed rule with adequate justification and time for public comment. It should also require consultation with affected Tribes. The appearance of this alleged Final Rule is an abuse of power and discretion by the Assistant Secretary-Indian Affairs and should be rescinded immediately.

For these reasons we ask immediate rescission of the alleged Final Rule published on March 30, 2020 and implementation of 25 CFR§170.443 by the Division of Transportation.

Sincerely,

Mark N. Fox
Chairman, COLT Board of Directors
Chairman, Three Affiliated Tribes, Mandan, Hidatsa and Arikara Nation

COLT

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April 28, 2020

The Honorable Steven Mnuchin
Secretary of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

Re: *Response to April 22, 2020, Treasury Tribal Advisory Committee's Letter re: TTAC CARES Act Relief Funding Recommendation*

Dear Secretary Mnuchin:

The Coalition of Large Tribes (COLT) is writing in response to the Treasury Tribal Advisory Committee's (TTAC) letter dated April 22, 2020, relating to the distribution of the \$8 billion appropriated to Indian tribal governments through the CARES Act, Coronavirus Relief Fund. TTAC is urging the Department of Treasury (Treasury) to develop a distribution formula without regard to tribal land base, and this is wrong.

COLT is a federally chartered coalition of treaty tribes responsible for governing a minimum of 100,000 acres. Our member tribes' land base covers over 50 million acres in Arizona, Colorado, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington. COLT recognizes the need to educate the Administration, Congress, public, and other tribes about the unique issues impacting tribes who government large land bases. As such, TTAC's letter is a good example.

The TTAC letter states in part:

"Most tribal governments would prefer to give more weight to the actual impacts of this pandemic, population, and employees in the development of the distribution method. These factors represent the human aspects to which the governments owe their greatest focus and for whom Congress drafted Title VI of the CARES Act."

"Factoring land base into the formulation may have unintended consequences for Treasury in the distribution of CRF funds since it is not an indicator of need or population."

Contrary to the above statements, our tribal resources, especially those resources that come from our lands enable us to provide much needed human services to our members. The six tribes who signed the TTAC letter, with the exception of the Navajo Nation, have land bases ranging from less than 1 acre to 57,000 acres.

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Page Two – The Honorable Steve Mnuchin, April 27, 2020

We do not expect these tribes to understand the amount of expense and resources required to govern large and rural land bases, but they should also not purport to represent to you that excluding land base from a distribution formula is in any way acceptable.

Many tribes have land bases that cross county and state lines which exponentially increases costs and the amount of resources needed to govern our reservations.

COLT supports a formula that includes: land base, population, employees, and expenditures. Additionally, COLT supports a minimum base amount to each tribe, as well as, a maximum amount allocated to each tribe.

Thank you for your consideration.

Sincerely,



Mark N. Fox
Chairman
Board of Directors
Chairman
Three Affiliated Tribes
Mandan, Hidatsa, and Arikara Nation