

ATTACHMENT 11b/Tribal Consortium

[Tribal Consortium Model Agreement – Tribal Consortium]

[Note: A transportation reauthorization, “Fixing America’s Surface Transportation Act” (FAST Act), Pub. L. 114-94 (December 4, 2015), was enacted for FYs 2016 through 2021. There is no authorization for a Consortium to operate its TTP for any portion of the 2022 fiscal or calendar year unless Congress either extends the FAST Act or enacts a new authorization and the Addendum is consistent with the existing authority.]

**(SELECT: [FY OR CY]) [(INSERT: APPLICABLE YEAR(S))
TRIBAL TRANSPORTATION PROGRAM ADDENDUM
TO THE
[ANNUAL/MULTI-YEAR] FUNDING AGREEMENT
BETWEEN THE
[NAME OF CONSORTIUM]
AND THE
UNITED STATES OF AMERICA**

Section 1. Authority

This Addendum to the [SELECT: AFA or MFA] Funding Agreement [SELECT: AFA or MFA] is entered into by and between the [Name of Consortium] (“Consortium”) and the United States of America (“United States”), acting through the Secretary of the Interior or an authorized designee (“Secretary”), pursuant to the authorities set forth in the Tribal Self-Governance Act of 1994, Title IV of Public Law 93-638, as amended, (“Act”); Title 23 of the United States Code, as amended by the “Fixing America’s Surface Transportation Act” (“FAST Act”), Public Law 114-91 (December 4, 2015), 25 C.F.R. Part 170, and 25 C.F.R. Part 1000. Except where otherwise noted herein, this Addendum is subject to all provisions of the Consortium’s [SELECT: AFA or MFA] and the Compact of Self-Governance between the Consortium and the Secretary (“Compact”).

Section 2. Effective Date

This Addendum shall become effective as of the date it is executed by authorized representatives of the Consortium and the Secretary and attached and incorporated into the Consortium’s [SELECT: AFA or MFA.] It shall remain in effect until it is terminated, renegotiated by mutual agreement, the [SELECT: AFA or MFA] expires, or expiration of the FAST Act, whichever comes first.

Section 3. Purpose

The Consortium's [SELECT: AFA or MFA] and this Addendum transfer to the Consortium all the funding and responsibility for its member tribes' share of the Tribal Transportation Program, including all highway and bridge programs authorized to be assumed under the FAST Act; 25 C.F.R. Part 170; and Chapter 2 of Title 23 of the United States Code, as amended, (hereafter collectively referred to as the "TTP"), including those programs, functions, services, and activities, or portions thereof (collectively, "PFSAs") which are specifically or functionally related to the administration of the TTP and are otherwise provided by the Secretary to the Consortium. In the event of a conflict between this Addendum and the Consortium's [SELECT: AFA or MFA], the provisions of this Addendum shall control solely with respect to the PFSAs authorized to be assumed under this Addendum. The following tribes are included in this Addendum: *[Note: Identify the tribes that have authorized and are participating in this Addendum.]*

Section 4. Use of Tribal Facilities and Purchase of Equipment

[Note to Tribal and Federal Negotiators: The Parties should address any special equipment issues that may arise only in a particular BIA Region, such as access to BIA operated equipment pools.]

Subject to a Tribal Transportation Program Transportation Improvement Program approved by the Federal Highway Administration ("FHWA-approved TIP"), the Consortium or its member tribes may make available facilities and equipment that it owns, at industry standard lease or rental rates, in order to carry out the purposes of this Addendum. The Parties agree that, subject to an FHWA-approved TIP, the Consortium shall be permitted to utilize TTP, other FHWA Trust, or other funds awarded under the Consortium's [SELECT: AFA or MFA] to pay such lease/rental rates and to maintain such equipment when performing PFSAs under this Addendum. For purposes of this Addendum, in those cases where the Consortium reasonably determines that the purchase of equipment is more cost effective than the leasing of equipment, the Parties agree that, subject to an FHWA-approved TIP, the purchase of equipment shall be an allowable cost to the Consortium. The purchase of road maintenance equipment shall be subject to the limitations provided by 23 U.S.C. § 202 (a)(8)(A), to wit, the Tribe shall not use an amount more than the greater of 25% of its annual TTP share or \$500,000, for the purchase of road maintenance equipment.

Section 5. Limitation of Costs

[Note to Tribal and Federal Negotiators: At the Consortium's option, this section may be

deleted if the Consortium's [A/M] funding agreement already includes similarly protective language.]

The Consortium shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under the Consortium's [SELECT: AFA or MFA] to perform the PFSAs authorized under this Addendum.

Section 6. Time and Method of Payment

[Note to Tribal and Federal Negotiators: The Consortium should specifically list in its [SELECT: AFA or MFA] or reprogramming report all the funds to be paid within this 30-day timeframe. Depending on which TTP PFSAs the Consortium has chosen to assume and whether it has special non-recurring TTP funding in a given year, the funding items may include the following: TTP Construction and/or Planning funds, TTP Bridge funds, other FHWA Trust funds, or other funds under an agreement involving among a state or a political subdivision of a state, the United States and the Consortium under 23 U.S.C. § 202 (a)(9).]

In accordance with 23 U.S.C. § 202 (b)(4)(A), the Secretary, acting at the option of the Consortium through the Office of Self-Governance ("OSG") as sub-allottee, shall pay to the Consortium or its designee, through an electronic fund transfer in a single annual lump sum, all the TTP and related transportation program funds identified in the Consortium's [SELECT: AFA or MFA] within 30 days after the funds are made available to the Secretary from the FHWA. Upon the receipt of funds from the FHWA, the Secretary shall notify the Consortium or its designee in writing that the funds are available for payment.

The total funds awarded under the Consortium's [SELECT: AFA or MFA] for PFSAs authorized to be performed under this Addendum will be adjusted to reflect all funding in the TTP authorized by the FAST Act and any eligible appropriations made available to the Secretary or passed through to the Bureau of Indian Affairs ("BIA") from the FHWA for transportation projects identified for the Consortium. In addition, the Consortium will receive:

- (1) all supportive administrative funds in accordance with 23 U.S.C. § 202 (b) (6)(B) and
- (2) special allocations attributable to any TTP and TTP Bridge funds, or other funds identified for the Consortium if any such funds become available during the effective term of this Addendum.

The Consortium shall be eligible to receive additional TTP funds on the same basis as other Indian tribes according to 23 U.S.C. § 202 (b), as well as other eligible funds available for the

Consortium's member tribes on a competitive, formula, or other basis.

Section 7. Contract Support Costs

Pursuant to 25 C.F.R. §§ 170.607-170.608, Contract Support Costs ("CSCs") are an eligible item out of a Consortium's TTP allocation and need to be included in a Consortium's program budget. The Parties acknowledge that no additional TTP funds are available to pay CSCs to the Consortium with regard to the PFSAs assumed under this Addendum.

Section 8. Use of Funds and Flexible Financing

- A. Payments to the Consortium shall be subject to the availability of the appropriation of funds by the Congress of the United States. Pursuant to 23 U.S.C. § 202 (b)(6) and 25 U.S.C. § 5325(a)(1), all funds shall be paid to the Consortium without regard to the organizational level at which the Department of the Interior has previously carried out the PFSAs involved.
- B. The Consortium shall use the TTP funds advanced under the Consortium's [SELECT: AFA or MFA] to perform eligible PFSAs authorized under 23 U.S.C. § 202 (a) and 25 C.F.R. Part 170, as amended by the FAST Act, other applicable laws, and as authorized under this Addendum. The Consortium reserves the right to reprogram funds among the eligible projects identified on an FHWA-approved TIP, so long as such funds are used in accordance with Federal appropriations law.
- C. The Consortium may use TTP funds provided under the Consortium's [SELECT: AFA or MFA] for flexible financing as provided in 23 U.S.C. § 122, 25 C.F.R. §§ 170.300-170.303, and other applicable laws, provided that the Consortium enters into an Advance Construction Agreement and Project Agreement, when applicable.
- D. The Consortium may issue bonds or enter into other debt financing instruments under 23 U.S.C. § 122 with the expectation of payment of TTP funds to satisfy the instruments. The Parties acknowledge that this Addendum does not create a commitment, guarantee, or obligation on the part of the United States to provide for payment of debts of the Consortium to third parties for loan principal or interest on any debt financing instrument that the Consortium may enter into, nor does this Addendum create any right of a third party against the United States for payment under any debt financing instrument that the Consortium may enter into.

- E. The Consortium may use TTP funds awarded under the Consortium’s [SELECT: AFA or MFA] to meet matching or cost participation requirements for any Federal or non-Federal transit grant or program.

Section 9. Reporting

- A. The Consortium will provide the Secretary with an annual financial status report within 90 calendar days after the end of the [SELECT: fiscal or calendar] year. This report will contain a recording of obligations and expenditures for the work accomplished to date, based on activity.
- B. Additionally, in order to assist the Consortium with fulfilling the requirements of 23 U.S.C. § 201 (c)(6)(C), the BIA will establish an electronic data reporting system, the Consortium shall be responsible for inputting its data into that system, and the Consortium shall provide its reports to the Director of the BIA no later than December 30 of each year. From that data, a report will be generated by BIA and FHWA for the Secretaries of the Interior and Transportation, respectively. The Consortium acknowledges its understanding that the submittal of its data is mandated by statute, and that non-compliance with this requirement may be a sole basis for withholding funding until the Consortium achieves compliance with this requirement.

Section 10. Buyback of Services and Retained Funds

- A. Buyback of Services: The United States may, at its option, accept and utilize funds returned by the Consortium as a payment for services rendered or through some other funding arrangement as a buyback of services to perform PFSAs for the benefit of the Consortium. In the event that the buyback of services option is employed, the Secretary shall, upon written request from the Consortium, promptly report to the Consortium in writing on the accomplishments of the Secretary and the obligation/expenditure of the funds and return to the Consortium any unobligated or unexpended funds.
- B. Retained Funds: Through the Consortium’s [SELECT: AFA or MFA] or reprogramming documents, the Consortium and the Secretary may negotiate and agree to an amount of funds to be retained by the Secretary to perform any PFSAs identified in writing.
 - 1. Upon written request, the Secretary shall provide the Consortium with a project/program accounting and accomplishment report for

the PFSAs performed.

2. Upon written notice, the Consortium may choose to perform any or all PFSAs previously identified for performance by the Secretary. The Secretary will provide a project/program accounting to the Consortium and immediately return any unobligated or unexpended funds to the Consortium.
3. No later than *[insert appropriate date here]*, the Secretary shall reconcile all of its expenditures incurred on behalf of the Consortium through the end of *[insert appropriate date here]* and estimate its projected expenditures on behalf of the Consortium through the end of the Federal fiscal year. In the event that unexpended retained funds are projected to remain at the end of the Federal fiscal year, the Secretary shall return the projected unexpended funds to the Consortium no later than *[insert appropriate date here]*.

[Note to Tribal and Federal Negotiators: If there are no retained functions identified in Section 12.D., then Sections 10.B.2. and 10.B.3. should be deleted.]

Section 11. Obligations of the Consortium

[Note to Tribal and Federal Negotiators: In this section, the Consortiums and the Secretary may specifically identify all the PFSAs which the Consortium intends to perform itself and the contractible PFSAs which the Consortium, at its option, chooses to leave with the BIA to perform on the Consortium's behalf. Among the PFSAs that the Consortium may wish to perform itself are: Transportation Planning; Program Management and Administration; Project Development, including, but not limited to, Plans, Specifications and Estimates ("PS&E") Development and Approval; Construction; Construction Management; Construction Engineering; Road Maintenance as authorized under the FAST Act, 23 U.S.C. § 202 (a) (not more than 25% of the funds allocated to a Consortium for its member tribes 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 23 U.S.C. § 202 (a)(8)(C); public transit services, including capital purchase, operations, and maintenance; and other TTP-eligible activities authorized under Chapter 2 of Title 23 United States Code or 25 C.F.R. Part 170, as each may be amended by the FAST Act, or other applicable law.]

In carrying out the responsibilities and obligations of the Consortium pursuant to this Addendum, Title IV of the Act and Title 23 of the United States Code, and within available TTP funding, the

Consortium:

- A. Agrees to carry out a transportation planning process for the BIA to maintain an inventory of roads and bridges for the Consortium, and to support funding, prioritization, and programming of TTP projects by implementing a current Control Schedule and a FHWA-approved TIP; and
- B. Assures the Secretary that it will meet or exceed applicable health and safety standards related to the administration, planning, design, and construction PFSAs assumed under this Addendum. To this end, and within available funding, the Consortium will provide all necessary qualified personnel (including licensed engineers to perform the design phase), equipment, materials, and services necessary to administer the PFSAs in compliance with 25 C.F.R. Part 170, as modified by the FAST Act. In the event that the above-cited regulatory provisions conflict with the provisions of TTP, the provisions of TTP shall govern. The Consortium may, at its option, choose to apply certain other guidelines upon prior written notice to the Secretary, including but not limited to, the October 28, 1987 draft or the most recent revision of 57 BIAM; the Program Agreement between the BIA and FHWA; and other Federal directives, program memoranda or regulations (including Federal Acquisition Regulations). Additionally, the Consortium may, at its option, develop Tribal policies, procedures, program guidelines and memoranda which meet or exceed federal standards to facilitate operation of any aspect of the TTP assumed by the Consortium under this Addendum; and
- C. Agrees to perform all Plan, Specification and Estimate (PS&E) review and approvals for projects developed under this Addendum in accordance with 23 U.S.C. § 202 (b)(5), and provide a file copy of the approved PS&E to the BIA or the facility owner, in full compliance with the statutory and quality assurance requirements made applicable under this Addendum; and
- D. Agrees to obtain all right-of-way and utility agreements necessary for construction. The Consortium further agrees to prepare all environmental and archaeological documents necessary for approval in accordance with applicable laws. Nothing in this Addendum, or performed pursuant to this Addendum, shall act to diminish the inherent sovereign governmental authority and jurisdiction of the Consortium's member tribes over their members and trust, restricted, or allotted land within their territory. At the option of the Consortium, all recorded deeds or other instruments transferring title to real property acquired in whole or in part with Addendum funds shall include a written statement that the deed or the

instrument shall not be construed to diminish the respective member tribe's inherent sovereign governmental authority and jurisdiction over its members and trust, restricted, or allotted land within its territory; and

- E. Assures the United States that all TTP projects constructed under this Addendum will comply with the approved PS&E and the construction standards set forth in this Addendum.

Section 12. Obligations of the United States

The Secretary shall:

- A. Administer this Addendum in compliance with the Act, the FAST Act, 25 C.F.R. Part 1000 and 25 C.F.R. Part 170. In event that the above-cited regulatory provisions conflict with the provisions of the FAST Act, the BIA and OSG shall comply with the provisions of the FAST Act; and
- B. Through the BIA, participate in a final inspection of construction projects, in accordance with 25 C.F.R. § 170.473 [*Note to Tribal and Federal Negotiators: The Consortium and the Secretary may also agree to one or more project monitoring visits to be paid for from the BIA's own project-related administrative funds*]; and
- C. Upon the request of the Consortium, promptly advise the Consortium of the status of the BIA's updates of the TTP Inventory and the FHWA-approved TIP approval process and make copies of this information available to the Consortium; and
- D. Through the BIA, satisfactorily perform all retained functions as follows: [*Note to Tribal and Federal Negotiators: If there are retained functions, list them here. If there are no retained functions, put "None" here and delete Sections 10.B.2. and 10.B.3.*]

[Name of Consortium]

[Tribal Chair, Chief Executive Officer, or President]

Date

UNITED STATES OF AMERICA

Assistant Secretary—Indian Affairs or Delegate

Date