

countermeasures which affect safety on the FWS transportation systems.

(f) While the SMS applies to appropriate transportation facilities serving the Refuge System funded under the FLHP, the extent of system requirements (e.g., data collection, analyses, and standards) for low volume roads may be tailored to be consistent with the functional classification of the roads. However, sufficient detail should be included for each functional classification to provide adequate information for use in making safety decisions in the RR program.

#### **§ 972.214 Federal lands congestion management system (CMS).**

(a) For purposes of this section, congestion means the level at which transportation system performance is no longer acceptable due to traffic interference. For those FWS transportation systems that require a CMS, in both metropolitan and non-metropolitan areas, consideration shall be given to strategies that reduce private automobile travel and improve existing transportation system efficiency. Approaches may include the use of alternate mode studies and implementation plans as components of the CMS. The FWS shall consider the results of the CMS when selecting the implementation of strategies that provide the most efficient and effective use of existing and future transportation facilities, and alleviate congestion.

(b) In addition to the requirements provided in § 972.204, the CMS must meet the following requirements:

(1) For portions of the FWS transportation system within TMAs, the FWS transportation planning process shall include a CMS that meets the requirements of this section. By agreement between the TMA and the FWS, the TMA's CMS coverage may include the transportation facilities serving the Refuge System, as appropriate. Through this agreement(s), the FWS may meet the requirements of this section.

(2) If congestion exists at a FWS facility within the boundaries of a TMA, and the TMA's CMS does not provide coverage of the portions of the FWS transportation facilities experiencing congestion, the FWS shall develop a separate CMS to cover those facilities.

(3) For portions of the FWS transportation system outside the boundaries of TMAs, the FWS shall:

- (i) Develop criteria to determine when a CMS is to be implemented for a specific transportation system; and
- (ii) Have CMS coverage for all transportation facilities serving the Refuge System, as appropriate, funded

through the FLHP that meet minimum CMS needs criteria.

(4) A CMS will:

- (i) Identify and document measures for congestion (e.g., level of service);
- (ii) Identify the causes of congestion;
- (iii) Include processes for evaluating the cost and effectiveness of alternative strategies to manage congestion;
- (iv) Identify the anticipated benefits of appropriate alternative traditional and nontraditional congestion management strategies;
- (v) Determine methods to monitor and evaluate the performance of the multi-modal transportation system;
- (vi) Appropriately consider the following example categories of strategies, or combinations of strategies for each area:
  - (A) Transportation demand management measures;
  - (B) Traffic operational improvements;
  - (C) Public transportation improvements;
  - (D) ITS technologies;
  - (E) Additional system capacity; and
- (vii) Provide information supporting the implementation of actions.

[FR Doc. 04-4054 Filed 2-26-04; 8:45 am]

BILLING CODE 4910-22-U

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

#### **23 CFR Part 973**

[FHWA Docket No. FHWA-99-4968]

FHWA RIN 2125-AE53

#### **Federal Lands Highway Program; Management Systems Pertaining to the Bureau of Indian Affairs and the Indian Reservation Roads Program**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule provides for the development and implementation of pavement, bridge, safety, and congestion management systems for transportation facilities providing access to Indian lands and funded under the Federal Lands Highway Program (FLHP) as required by the Transportation Equity Act for the 21st Century (TEA-21). The roads funded under the FLHP include Park Roads and Parkways, Forest Highways, Refuge Roads, Indian Reservation Roads, and Public Lands Highways. These management systems will provide a strategic approach to transportation planning, program development, and project selection.

**EFFECTIVE DATE:** March 29, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bob Bini, Federal Lands Highway, HFPD-2, (202) 366-6799, FHWA, 400 Seventh Street, SW., Washington, DC 20590; office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays. For legal questions, Ms. Vivian Philbin, HFL-16, (303) 716-2122, FHWA, 555 Zang Street, Lakewood, CO 80228. Office hours are from 7:45 a.m. to 4:15 p.m., m.t., Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access**

This final rule, the ANPRM, the NPRM, and all comments received by the U.S. Docket Facility, Room PL-401, may be viewed through the Docket Management System (DMS) at <http://dms.dot.gov>. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of this Web site.

An electronic copy of this document may be downloaded by 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 reach the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's Web site at: <http://www.access.gpo.gov/nara>.

##### **Background**

Section 1115(d) of the TEA-21 (Pub. L. 105-178, 112 Stat. 107, 156 (1998)) amended 23 U.S.C. 204 to require the Secretary of Transportation and the Secretary of each appropriate Federal land management agency, to the extent appropriate, to develop by rule safety, bridge, pavement, and congestion management systems for roads funded under the FLHP. The roads funded under the FLHP include, but are not limited to, Park Roads and Parkways, Forest Highways, Refuge Roads, Indian Reservation Roads, and Public Lands Highways. The Secretary of Transportation delegated to the FHWA the authority to serve as the lead agency within the U.S. Department of Transportation (USDOT) to administer the FLHP (see 49 CFR 1.48 (b)(29)). This rulemaking action addresses the management systems for the Bureau of Indian Affairs (BIA) and the Indian Reservation Roads (IRR) program. Separate final rules on management systems have also been developed for the National Park Service (NPS) and the Park Roads and Parkways program, the Fish and Wildlife Service (FWS) and the

Refuge Roads program, and the Forest Service (FS) and the Forest Highway program. The other three related final rules are published elsewhere in today's **Federal Register**.

On September 1, 1999, the FHWA issued an advance notice of proposed rulemaking (ANPRM) to solicit public comments concerning development of this proposed rule pertaining to the BIA and the IRR program (64 FR 47746). The ANPRM requested comments on the feasibility of developing a rule to meet both the transportation planning and management systems requirements of the TEA-21. A management system is a process for collecting, organizing, and analyzing data to provide a strategic approach to transportation planning, program development, and project selection. Subsequently, the FHWA decided to issue a separate rulemaking document for the management systems. Additionally, transportation planning is also being addressed under U.S. Department of the Interior rulemaking for the IRR program, and a notice of proposed rulemaking (NPRM) was published on August 7, 2002 (67 FR 51328).

On January 8, 2003 (68 FR 1105), the FHWA issued a NPRM seeking comments on the proposal to develop and implement management systems. These comments are summarized in the "Summary of Comments" section. Based on the comments received to the docket and during the consultation with the Indian Tribal Governments (ITGs), the FHWA developed this final rule to provide for the development and implementation of pavement, bridge, safety, and congestion management systems for transportation facilities providing access to Indian lands and funded under the FLHP. There are instances where reference is made to transportation planning because the management systems serve as a guide to planning activities, however, this final rule only implements the development of management systems.

During the rulemaking process, the FHWA considered other elements for their relationship to the management systems. Among these was the need for an environmental management system (EMS). The FHWA is supporting and participating in the development of the American Association of State Highway and Transportation Officials' Center for Environmental Excellence in which EMSs, as they relate to transportation, are a major component. This is consistent with the FHWA's priority on environmental stewardship and streamlining. In addition, the FHWA continues to demonstrate environmental stewardship by promoting the use of

EMSs in the construction, operation, and maintenance of transportation facilities. As implementation plans are developed for the management systems, the FHWA will promote coordination of the transportation management systems with individual agency plans to implement an EMS. At a minimum, this would provide an opportunity to link existing environmental data to the transportation management systems using a common geographic information system. The FHWA decided not to address EMS as part of this rulemaking action, but recognizing the importance of EMS initiatives, the FHWA believes that EMSs are most appropriately pursued as part of sound business planning of each individual agency.

#### Summary of Comments

The FHWA received fifteen comments to the docket. Of these, ten were from ITGs, tribal councils or tribal associations, including the Asa'carsarmiut Tribe, the Assiniboine and Sioux Tribes of the Ft. Peck Reservation (the Ft. Peck Tribes), the Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma, the Confederated Tribes of the Colville Reservation (the Colville Tribes), the Craig Community Association and Organized Village of Kasaan, Kawerak, Inc., the Standing Rock Sioux Tribe, the United South and Eastern Tribes (the USET), and the Washoe Tribe of Nevada and California (the Washoe Tribe). Three State Departments of Transportation (State DOTs) submitted comments individually, including California (Caltrans), Washington (WSDOT), and Wyoming (WYDOT). A coalition of five State DOTs, including the State DOTs from Idaho, Montana, North Dakota, South Dakota and Wyoming (the State DOT coalition) submitted a collective comment. The remaining comment was from the Great Plains Regional Office of the U.S. Department of the Interior, Bureau of Indian Affairs.

#### Consultation/Participation

**Comments:** Five commenters, including Caltrans, the Colville Tribes, the Fort Peck Tribes, Kawerak, Inc., and the Standing Rock Sioux Tribe recommended providing additional opportunities for tribal consultation before the rulemaking was finalized, as detailed below.

Caltrans suggested the tribal consultation component of the rulemaking process was weak, due to the fact that all of the consultation meetings were held outside of California.

The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe proposed that the management systems for the Indian Reservation Roads (IRR) program should be considered only after full government-to-government consultation.

Kawerak, Inc., a regional non-profit organization providing services to 20 Alaska Native Villages in the Bering Strait region, suggested that the rule be issued as an interim final rule to permit review and revision through consultation with ITGs and any future IRR Program coordinating committee (a committee recommended to be established in the proposed IRR program NPRM, developed pursuant to 23 U.S.C. 202 (d), that provides input and recommendations to the BIA and the FHWA.)

**Response:** The FHWA hosted seven public information and consultation meetings with numerous representatives of ITGs throughout the country. The purpose of these sessions was to explain the FHWA's intent in developing this rule and to seek input and feedback. These meetings also provided the FHWA an opportunity to highlight the importance of public comment, and describe how to submit comments to the docket.

All of these meetings were announced in the **Federal Register** and were held in Albuquerque, NM; Fairbanks, AK; Fort Snelling, MN (Minneapolis, MN area); Nashville, TN; Portland, OR; Las Vegas, NV; and Tulsa, OK. The Las Vegas meeting was held in conjunction with a previously scheduled meeting of the Indian Reservation Roads Program Negotiated Rulemaking Committee.<sup>1</sup> Tribal representatives from 74 federally recognized ITGs, tribal councils, or tribal associations attended these seven public information and consultation meetings, and provided suggestions and comments. Additionally, the FHWA made a presentation in February 2003 at the Northern Plains Tribal Transportation Planning meeting in Billings, Montana. Tribal representatives from 13 reservations, three of which have two or more tribes, Bureau of Indian Affairs staff, tribal

<sup>1</sup> The Committee was authorized by Congress in 23 U.S.C. 202 (d), and formed to conduct negotiated rulemaking (5 U.S.C. 565) for the purposes of recommending program policy, uniform and consistent rules, and a funding formula for the Department of Interior in implementing the IRR program. These proposed regulations will be prepared and issued by the Secretary of the Interior with the active participation of the designated tribal representatives as well as the designated Federal representatives, three of which were from the USDOT.

consultants and staff from the Montana State DOT attended this meeting.

It was determined most practical that the method of consultation for this rulemaking was through the nationwide or regional informational sessions and attempts to coordinate these sessions with other tribal transportation meetings. Therefore, the FHWA determined that sufficient consultation with ITGs and representatives has occurred in the development of this final rule. In developing this final rule, the FHWA has carefully reviewed and analyzed the comments provided from ITGs, as well as the concerns raised at the seven public information and consultation meetings. The comments have directly resulted in several changes to the rule that are discussed in the Section-by-Section analysis. In that regard, the FHWA believes the rule adequately addresses the concerns of the ITGs, and in particular, provides additional opportunities for tribal consultation in the implementation of the rule.

#### *Relationship to the Negotiated Rulemaking*

*Comment:* Five ITGs or tribal associations, including the Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma, the Colville Tribes, the Fort Peck Tribes and the Standing Rock Sioux Tribe submitted comments regarding the relationship of this rule to the proposed rulemaking action by the Department of the Interior (DOI) to establish policy and procedures governing the IRR program, and to establish a funding formula.<sup>2</sup>

The Cherokee Nation of Oklahoma commented that earlier requests (at the ANPRM and NPRM phases) to have this rule included in the development of the DOI's IRR program rule were ignored, and reiterated the point that this rule should not be developed without tribal consultation and participation.

The Chickasaw Nation of Oklahoma identified the importance of having the DOI's final rule for the IRR program, based on the recommendation of the Negotiated Rulemaking Committee, in place prior to development of the management systems under this rule. This point was emphasized because the management systems will be dependent

on the BIA's IRR inventory, which will be a key product of the DOI's rule.

Further, the Colville Tribes, the Fort Peck Tribes and the Standing Rock Sioux Tribe were concerned about possible inconsistencies between the two rules, because the DOI's proposed rule contains a provision permitting Indian tribes to develop management systems.

*Response:* Section 1115(b) of the TEA-21 requires the Secretary of the Interior, not the Secretary of Transportation, to issue regulations governing the IRR program, and establish a funding formula. The TEA-21 further required that the IRR regulation be established using a negotiated rulemaking committee. In contrast, this rulemaking is required by section 1115(d) of the TEA-21, and is a separate rulemaking requirement not tied to the negotiated rulemaking committee's efforts to recommend regulations governing the IRR Program, and to establish the funding formula for that program. The FHWA understands the relationship between specific products of the IRR program such as the BIA's IRR inventory and the management systems required by this final rule, and agrees that the implementation plan for the BIA/IRR management systems must adequately define the relationship between the data from the BIA's IRR inventory and the management systems.

The FHWA concurs with the importance of continued consultation with ITGs, and this rule includes a process for developing the implementation plans for the management systems that specifically calls for tribal consultation in developing details of each of the mandated nationwide management systems. This process will provide opportunity for further tribal consultation related to such issues as overall goals, policies, agency responsibilities, an implementation schedule, possible data sources, including the need to accommodate State and local data, and costs.

#### *Self-Determination*

*Comment:* The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe commented that the NPRM "deprives Indian tribes the ability and flexibility to craft the IRR Program and tribally-driven management systems unique to the needs and limited resources of each tribe." In a related issue they expressed concern over the lack of ability to determine whether a mandate to include data provided by State and local governments would benefit the tribal program.

*Response:* This final rule on management systems will govern how the management systems will be implemented. The rule does not mandate management systems for ITGs, recognizing the limited resources that are available to ITGs for their transportation programs. The responsibility for the nationwide management systems lies with the BIA. In the interest of overall compatibility and functionality, this rule triggers compliance for tribes only if an ITG specifically decides to implement management systems. In that context, an ITG retains the ability and flexibility to tailor the management systems to its needs and resources, once having made the specific commitment to implement management systems. Further, § 973.204(e) has been changed to provide for the BIA, in consultation with the tribes, or the tribes under a self-determination contract or self-governance agreement, to make the determination on including data provided by States and local governments in the management systems. The FHWA encourages those States and local governments having implemented management systems meeting the requirements of 23 U.S.C. 303, that include information on State, county or local IRRs, to share the management systems information with the BIA and ITGs. State and local governments not having management systems are also encouraged to share existing information with the BIA and ITGs.

#### *Implementation—Process and Coordination Issues*

*Comment:* Nine comments were received concerning procedural and coordination issues in the implementation of the management systems, including comments from Caltrans, the Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma, the Colville Tribes, the Fort Peck Tribes, the Standing Rock Sioux Tribe, the State DOT coalition, the USET, and the WYDOT. The comments, detailed below, identify issues such as the relationship of the management systems to other applicable statutes and regulations; expected results; coordination with States, regional and local governments, and tribes; compatibility and communication among systems; use of the systems; and the impact on tribal decisionmaking.

Caltrans expressed a need for coordination of the data required for the management systems with data requirements that may result from the DOI's rule for the IRR program, as well

<sup>2</sup> Section 1115(b) of TEA-21 requires the Secretary of the Interior to establish a negotiated rulemaking committee to make recommendations to the Secretary of the Interior on establishing these regulations. On August 7, 2002 (67 FR 51328), the BIA issued an NPRM proposing to establish policy, procedures and a funding formula governing the IRR program. As of the date of issuance of this final rule, the BIA has not yet issued a final rule for the IRR Program.

as transportation planning requirements under 23 U.S.C. 134 and 135.

The Cherokee Nation of Oklahoma expressed concern about how these systems will be used. They view management system information as one of many planning factors to be considered, rather than solely a means for justifying future projects.

The Chickasaw Nation of Oklahoma commented about the important need for an effective communication process among tribes, cities, counties and States.

The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe reiterated the need for coordination with the DOI's rule for the IRR program for both transportation planning and management systems.

The State DOT coalition urged efficient implementation of the management systems as a means of controlling costs, minimizing the burden on States, and avoiding adverse effects on funding or other resources available for State programs. To help control costs, the State DOT coalition recommended the rule be revised to exclude State roads from the management systems. The State DOT coalition also suggested providing the Federal land management agencies the flexibility to pool resources to implement the management systems, and to set up systems compatible with existing State systems, whenever appropriate. For the State DOT coalition, an important component of strengthening the cooperative relationships with ITGs includes providing States access to accident data, within the limits of properly defined confidentiality parameters.

The USET expressed the need for a clear understanding of the products that will result from the system. In addition, it noted a difficulty in coordinating implementation plans among numerous tribes, and expressed concern for tribal officials being able to coordinate on an equal footing with State and local governments.

WYDOT emphasized the need for State DOTs to maintain sovereignty over roads under State DOT ownership, and advised caution that the use of management systems not alter decision-making processes for State roads.

*Response:* Section 973.204 of this final rule, entitled "Management systems requirements," includes a requirement for the BIA and the FHWA, in consultation with the Tribes, to develop an implementation plan for each of the nationwide management systems. These implementation plans will provide an opportunity for consultation and collaboration in the development of each of the nationwide

management systems. The plans will include, but are not limited to: Overall goals and policies concerning the nationwide management systems, each agency's responsibilities for developing and implementing the nationwide management systems, an implementation schedule, data sources, including the need to accommodate State and local data, and cost estimate.

In the public informational meetings, the FHWA emphasized that the required implementation plans for the nationwide management systems will address the types of issues raised by the commenters regarding coordination among agencies and the implementation process. Establishing goals and objectives for the nationwide management systems through a collaborative process provides a means to assure the data requirements are adequately coordinated with the DOI's proposed IRR program rule, and the transportation planning requirements of 23 U.S.C. 134 and 135 for Metropolitan and Statewide planning. This process will provide an opportunity to use the data needs and outputs of the management systems to best meet the combined needs and responsibilities of the BIA, FHWA, ITGs, States, and regional and local agencies. As highlighted by the comments, implementing some aspects of the management systems will require cooperation among entities that may not have previously worked together to provide information. The guidelines and expectations for this cooperative effort will be an important component of the implementation plans.

Implementation plans will also provide an opportunity to clarify other issues of responsibility. Nothing in the rule is intended to affect current responsibility for facilities covered by the management systems. The plans are intended to develop effective means of collecting and using information to improve decisionmaking for the IRR program, and to promote data sharing. Inclusion of State and local roads in the management systems does not assume that the BIA or ITGs would duplicate the data collection effort already undertaken by a State or local government. Rather, the emphasis is on the importance of cooperation and coordination in sharing data. While the FHWA has acknowledged part of the data collection burden may be a State responsibility, minimizing that burden is the BIA's responsibility in its role of establishing and maintaining the nationwide management systems. States and tribes will have the opportunity to help determine how the information is collected and used during the

development of the implementation plans. One important component of the management systems will be compatibility with existing State systems, as a means to minimize any additional data collection burden or duplication of effort.

Management systems are a tool for improving the efficiency and effectiveness of the IRR program. The FHWA agrees with the Cherokee Nation of Oklahoma that the output of the management systems is one of many factors to be considered by tribal officials in making transportation decisions. This goal is set forth in § 973.204(k), which states, in part: "The management systems shall be operated so investment decisions based on management system outputs \* \* \* can be utilized throughout the planning process." Overcoming longstanding, difficult problems, such as developing a data sharing protocol for confidential accident data, is an example of a significant process issue to be addressed in the implementation plans.

#### *Implementation—Management System Structure and Data Standards*

*Comment:* The FHWA received five comments regarding management system elements from the Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma, Kawerak, Inc., the State DOT coalition, and the USET covering the structure of the management systems, software and data standards, the relationship to existing data collection activities, and the extent of management system coverage of various transportation system components.

The Cherokee Nation of Oklahoma expressed concern about compatibility with other management systems and the level of data necessary to adequately serve the needs of the BIA and the tribes. This was similar to the State DOT coalition statement that data collection costs for the management systems would take resources away from projects.

The Chickasaw Nation of Oklahoma questioned whether current data collection for the IRR inventory was duplicative of information that would be collected for the pavement, bridge and safety management systems, and indicated that data would need to be collected annually. The Chickasaw Nation of Oklahoma also stressed the need for common safety management system requirements among State, tribal and local DOTs, including geo-referencing requirements for accurate spatial correlation of information.

Kawerak, Inc., made a similar comment in stating the need to

coordinate the pavement management system database with the IRR inventory.

The USET expressed concern that no software had been identified as a standard.

The State DOT coalition indicated that unpaved roads might not warrant inclusion in the management system due to the undue cost in acquiring and maintaining data for that portion of the system.

*Response:* The FHWA agrees there are a number of elements that must be evaluated as the management systems are implemented. Section 973.204 of the final rule establishes the context for evaluating these elements by providing the BIA with the latitude to tailor the nationwide management systems to meet the agency's goals, policies and needs using professional engineering and planning judgment to determine the required nature and extent of systems coverage consistent with the intent and requirements of this rule. By definition, the pavement management system (PMS) is intended to provide coverage for all paved roads in the IRR inventory since its purpose specifically refers to effective strategies for the reconstruction, rehabilitation and preventive maintenance of pavements. The BIA may choose to include all roads in the IRR inventory in the PMS for future planning purposes, but this rule does not require it. For clarification, the FHWA has added reference to the applicability of § 973.208 to only federally and tribally owned, paved IRRs.

Compatibility with other management systems, the level of data necessary to effectively support the BIA's objectives for the management systems, the frequency of data collection, the relationship to other transportation system data already being collected, and the selection of computer software, if any, to manage the data are all legitimate issues to be addressed by the BIA and the FHWA, in consultation with the tribes, as the implementation plans are developed. Rather than collect all data annually, § 973.204(f) of the final rule provides for the BIA, in consultation with the tribes, to select a process for operating and maintaining the databases needed to support the management systems. The key is that the information be collected periodically on a regularly recurring cycle, but not necessarily annually.

#### *Funding*

*Comment:* Next to comments requesting substantive changes to the proposed rule, funding for implementation of the management systems generated the greatest number

of comments from the States and tribal governments. Twelve comments were received regarding funding, including comments from the Asa'carsarmiut Tribe, Caltrans, the Cherokee Nation of Oklahoma, the Chickasaw Nation of Oklahoma, the Colville Tribes, the Craig Community Association and Organized Village of Kasaan, the Fort Peck Tribes, Kawerak, Inc., the Standing Rock Sioux Tribe, the USET, the Washoe Tribes, and the WYDOT. The comments generally focused on three issues, namely, the inadequacy of current IRR program funds; additional financial burden on the States; and, the need for a dedicated source of funds for the management systems, as detailed below.

Caltrans and WYDOT commented on the potential additional financial burden on the States since the current level of IRR funding was not adequate to meet all of the competing needs for program funding.

Seven ITGs or tribal associations, including the Asa'carsarmiut Tribe, the Colville Tribes, the Craig Community Association and Organized Village of Kasaan, the Fort Peck Tribes, Kawerak Inc., the Standing Rock Sioux Tribe, and the Washoe Tribes commented that the IRR two percent planning and construction funds are currently inadequate to support an additional activity.

In addition, the Cherokee Nation of Oklahoma, Kawerak, Inc., and the USET, commented about the need for a dedicated source of funds for the management systems.

On a separate issue, the Chickasaw Nation of Oklahoma expressed concern for the costs to the BIA associated with conducting life-cycle cost analysis.

*Response:* No dedicated source of funds exists for implementation of the management systems. Title 23, United States Code, section 204(a) requires the FLMAs, including the BIA, to develop and implement nationwide management systems. The source of funds identified for this activity is IRR program funds, which includes program management costs. Since specific management systems for the tribes are optional, development and implementation of tribal management systems are an appropriate use of the IRR two percent planning and construction funds.

#### *Additional Comments*

*Comments:* The Cherokee Nation of Oklahoma, the Craig Community Association and Organized Village of Kasaan, and the USET offered comments in support of the management systems citing the need for information on regional transportation conditions, their value as a planning

and programming tool, and the value to ITGs for improving their transportation systems.

In addition, the WSDOT supported management systems as a good business practice and offered technical assistance for their development.

*Response:* The FHWA supports efforts by WSDOT to provide technical assistance in the development of the management systems, and encourages all State DOTs to provide technical assistance, if requested. In addition, the FHWA appreciates identification by the Cherokee Nation of Oklahoma, the Craig Community Association and Organized Village of Kasaan, and the USET of the value of the management systems in supporting their transportation planning programs, and tribal transportation decisionmaking.

#### **Section-by-Section Analysis**

Comments and responses have been provided for those sections for which specific suggestions for change were received. Seven commenters, including the Chickasaw Nation of Oklahoma, the Colville Tribes, the Craig Community Association and Organized Village of Kasaan, Kawerak, Inc., the Fort Peck Tribes, the Great Plains Regional Office of the Bureau of Indian Affairs, and the Standing Rock Sioux Tribe suggested changes to specific sections of the rule. The FHWA has evaluated the suggested changes and has included several changes to improve the flexibility of the BIA and ITGs to develop and implement management systems, and add opportunities for consultation.

#### **Subpart A**

##### *Section 973.104 Definitions*

*Comment:* The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe recommended the addition of definitions for the words "Indian tribe" and "Intelligent Transportation Systems (ITS)."

*Response:* The FHWA agrees with the need to add these two definitions, and the final rule has been modified to reflect these two terms.

#### **Subpart B**

##### *Section 973.202 Applicability*

*Comment:* Kawerak, Inc., recommended inserting "Federal Highway Administration and \* \* \*" prior to "the Bureau of Indian Affairs." Kawerak, Inc. indicated that the tribes, in general, are not content with the BIA administration of the IRR Program, and desire more involvement by the FHWA.

*Response:* The BIA and the FHWA jointly administer the IRR program and, as such, the FHWA has a very active

role in this program. While the BIA is principally responsible for implementing this rule, the ITGs will be actively involved in the development of implementation plans for the management systems that support tribal transportation infrastructure. The FHWA has revised the language in § 973.202 to include applicability to the FHWA, since the FHWA will continue to carry out its roles of stewardship and oversight of the IRR program, and will participate with the BIA and the tribes in the development and implementation of the management systems.

#### *Section 973.204 Management Systems Requirements*

##### *Section 973.204(a)*

*Comment:* The Chickasaw Nation of Oklahoma suggested the need to add “after consultation with the tribes” to the end of § 973.204(a).

*Response:* The FHWA agrees with the principal of the comment. Therefore, to emphasize the need for consultation with the tribes and to address concerns for flexibility in developing and implementing the management systems, the following language has been inserted at the end of the paragraph, “after considering the input from the tribes, and using professional engineering and planning judgment to determine the required nature and extent of systems coverage consistent with the intent and requirements of this rule.” This phrase strengthens the language in the rule that requires the BIA to consult with the tribes throughout the process by putting emphasis on the results of the consultation. In addition, it emphasizes the need for engineering and planning judgment in making decisions about the details of the management systems.

*Comment:* Kawerak, Inc., recommended deleting the phrase “in consultation with the tribes” from § 973.204 and replacing it with “FHWA and the IRR Coordinating Committee.” Further, it recommends that §§ 973.204(i) and (j) be modified in a similar fashion. In addition, it recommends that all other references to “in consultation with the tribes” throughout the rule be replaced with the “IRR Coordinating Committee.”

*Response:* The FHWA disagrees with the recommended changes. Executive Order 13175 requires tribal consultation on policies with tribal implications. The language in the rule provides the broadest opportunity for tribal consultation. The FHWA agrees that any future IRR program coordinating committee could be asked to provide recommendations.

##### *Section 973.204(b)*

*Comment:* The Chickasaw Nation of Oklahoma requested the following be added to § 973.204(b) of the rule: “The requirements under these regulations shall be suspended until such time that 25 CFR part 170, Rules for Indian Reservation Roads are finalized.” This requested change referenced the close relationship between the BIA’s IRR inventory data, that would be governed by the proposed IRR program rule, and the management systems.

*Response:* The FHWA recognizes the close relationship between the BIA’s IRR inventory data and the management systems. However, the statutory mandate for the management systems rules is completely separate from the DOI’s proposed IRR program rule. The FHWA agrees with the intent of the requested change, but does not agree it is necessary to change the rule language to reach the intended objective. In the Background section, we have referenced the need for close coordination in the development of the implementation plans for the management systems with the IRR program rule. The BIA, the FHWA and the tribes will all have involvement in the development of the implementation plans. This consultative process will provide for effective coordination between the two rules.

##### *Section 973.204(c)*

*Comment:* For consistency with § 973.204(a) and to provide the tribes flexibility in developing tribal management systems, the FHWA has determined that the following phrase should be added to the end of § 973.204(c) “\* \* \* using professional engineering and planning judgment to determine the required nature and extent of systems coverage consistent with the intent and requirements of this rule.”

*Response:* The FHWA has modified § 973.204(c) to reflect this change.

##### *Section 973.204(d)*

*Comment:* The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe objected to the language in § 973.204(d) that provides for the BIA, in consultation with the tribes, to develop criteria for cases in which tribal management systems are not appropriate. In their view, this provision provides the BIA with “unfettered discretion” that limits the flexibility of ITGs to tailor management systems to meet their individual needs. They recommend that this provision be deleted.

*Response:* The FHWA disagrees with the need to delete this provision, and

has retained the original language. Section 973.204(d) requires that the BIA consult with the tribes in developing the criteria for cases in which tribal management systems are not appropriate. This provision affords ITGs restraint from the BIA unilaterally making decisions that would compromise the rights or abilities of the tribes to tailor management systems to their needs. The FHWA envisions that this provision of the rule may help to preserve the limited resources of the tribes in cases where the limited nature and extent of the tribal transportation system does not justify a substantial investment in tribal management systems. In these cases, the nationwide management systems would be sufficient.

##### *Section 973.204(i)*

*Comment:* The Colville Tribes, the Fort Peck Tribes, and the Standing Rock Sioux Tribe commented that § 973.204(i) was inconsistent with § 973.214(a) regarding tribal consultation. Section 973.214(a) includes a requirement for tribal consultation, and § 973.204(i) does not, even though both sections provide the criteria for determining when congestion management systems need to be implemented.

*Response:* Section 973.214(a) references tribal consultation in conjunction with criteria for congestion management systems for a specific federally or tribally owned IRR transportation system experiencing congestion, while § 973.204(i) focuses on criteria for generally determining when congestion management systems are required. For internal consistency among paragraphs of the rule, the FHWA agrees with the suggested change and § 973.204(i) has been modified to insert “in consultation with the tribes,” after “The BIA and the FHWA \* \* \*.”

For additional comment and response concerning § 973.204(i), see § 973.204(a) in the section-by-section analysis.

##### *Section 973.204(j)*

*Comment:* The Colville Tribes, the Fort Peck Tribes and the Standing Rock Sioux Tribe indicated that § 973.204(j) makes no allowance for tribal input into the evaluation of the effectiveness of the management systems.

*Response:* The FHWA agrees with the need to allow for tribal input into the evaluation of the effectiveness of the management systems and has modified the section by inserting “nationwide” before “management systems”; and, at the end of the paragraph adding “to assist the FHWA in evaluating the efficiency and effectiveness of the

management systems as a component of the IRR program, and may include consultation with the tribes, as appropriate."

For additional comment and response concerning § 973.204(j), see § 973.204(a) in the section-by-section analysis.

*Section 973.206 Funds for Establishment, Development, and Implementation of the Systems*

*Comment:* The Chickasaw Nation of Oklahoma recommended changing the word "may" to "shall" in the first sentence of this section, as recognition of the potential costs involved in implementing the management systems, and assuring that sufficient funds would be available.

*Response:* The FHWA disagrees with the need for this change. As stated above, responsibility for implementing the nationwide management systems lies with the BIA. Development and implementation of the management systems is an appropriate use of IRR program funds, and this paragraph provides the option for the BIA to use those funds rather than mandating use of those funds.

*Section 973.208 Indian Lands Pavement Management System (PMS)*

*Comment:* The Great Plains Regional Office of the Bureau of Indian Affairs recommended adding the words "paved surface" between "owned" and "IRRs" in § 973.208(a).

*Response:* This recommendation reiterates a comment addressed above in the section entitled, "Implementation—Management System Structure and Data Standards." By definition, the pavement management system (PMS) is intended to provide coverage for all paved roads in the IRR inventory since its purpose refers to effective strategies for the reconstruction, rehabilitation and preventive maintenance of pavements. However, to provide clarity, the FHWA has added the word paved between "owned" and "IRRs" in § 973.208(a).

*Comment:* The Craig Community Association and Organized Village of Kasaan specifically opposed having the BIA, Branch of Roads carry out the requirements of §§ 973.208, 973.210, 973.212 and 973.214.

*Response:* The emphasis in this rulemaking is on the development of nationwide management systems. As joint administrator of the IRR program, the BIA is the most appropriate entity to develop, establish and maintain the IRR management systems.

*Section 973.212 Indian Lands Safety Management System (SMS)*

*Comment:* Kawerak, Inc. recommended deleting the words "federally and tribally owned" from § 973.212(a), citing the need for the tribes to have a safety management system that covers all IRR roads, not only those that are federally or tribally owned.

*Response:* The language in the final rule gives responsibility to the BIA for developing management systems for facilities within its purview, as prescribed in 23 U.S.C. 204(a). Similarly, many States have chosen to take responsibility for developing management systems for roads under their ownership. The need to provide ITGs with information on all IRRs reinforces the importance of coordination between the agencies and the States for data sharing. In addition, it points out the distinction between responsibility for collecting and maintaining the data for certain portions of the system, and sharing and using the data for decisionmaking. These are critical issues to be addressed in the development of the implementation plans, but do not require a change in the rule language regarding management system coverage and responsibility. Rather, the FHWA encourages a cooperative relationship among the BIA, ITGs, States, and local governments and to share the information they may collect.

**Conclusion**

The FHWA anticipated substantial interest in this rulemaking and undertook a specific public information and consultation effort with the ITGs. As a result, the NPRM generated a significant number of comments from State DOTs and ITGs. These comments resulted in several changes to the final rule that responded directly to tribal and State DOT concerns, as described above. The majority of the changes respond to tribal concerns about consultation in the rulemaking process and implementation of the management systems following publication of the final rule, by providing additional opportunity for consultation with the tribes in the development, establishment and implementation of the management systems. In addition, the comments have helped to raise awareness about coordination of roles and responsibilities of all entities involved in the development of the implementation plans. The FHWA believes that the resulting changes have made improvements to the final rule that meet the needs of the ITGs and the

State DOTs, and will yield enhanced cooperation and consultation in the implementation of the final rule.

**Rulemaking Analyses and Notices**

**Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures**

The FHWA has determined that this rule is a significant regulatory action within the meaning of Executive Order 12866 and under the regulatory policies and procedures of the U.S. Department of Transportation because of the substantial public interest in the transportation facilities serving Indian lands. The Office of Management and Budget has reviewed this document under E.O. 12866. The FHWA anticipates that the economic impact of any action taken in this rulemaking process will be minimal. The FHWA anticipates that the rule will not adversely affect any sector of the economy in a material way. This rule will impact the BIA, however, it will not likely interfere with any action taken or planned by the BIA or another agency, or materially alter the budgetary impact of any entitlement, grants, user fees, or loan programs.

The FHWA has considered the costs and benefits associated with this rulemaking and the information provided in response to the NPRM, and believes that the benefits outweigh the costs of acquiring the management system information. Information provided by the management systems will enhance transportation investment decisions for the IRR program and improve the overall efficiency of the IRR transportation system. In addition, the management system information will assist the FHWA in its stewardship and oversight roles. The benefits of the management system information will be significant in relationship to the costs of implementation.

**Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this action on small entities. Title 23, U.S.C. requires that the FLMA implement nationwide management systems for roads funded under the FLHP. The BIA, as joint administrator of the IRR program, has the responsibility for developing and implementing the management systems. The FHWA has acknowledged a possible role for States and Metropolitan Planning Organizations (MPOs) in collecting data for the management systems; however, this role is not anticipated to include small entities. In addition, the BIA bears



the burden of implementing the management systems in a manner that will minimize the impact on non-Federal entities, including small entities. Due to the limited expectation that small entities will have any role in implementing the management systems, the FHWA has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This final rule will not impose a mandate that requires further analysis under the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This action will not result in the expenditure by State, local and ITGs, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532). This rulemaking provides for the development and implementation of pavement, bridge, safety, and congestion management systems for transportation systems providing access to and within Indian lands. These roads are funded under the FLHP; therefore, this action is not considered an unfunded mandate.

#### **Executive Order 13132 (Federalism)**

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999. The FHWA has determined that this action will not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this action will 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**

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA determined that this rule contains a requirement for data and information to be collected and maintained in the four

management systems that are to be developed. In order to streamline the process, the FHWA requested OMB approval for a single information collection clearance for all of the data in the four management systems at the time the final rule is published. The FHWA is sponsoring this proposed clearance on behalf of the BIA.

The FHWA estimates that a total of 5,600 burden hours per year would be imposed on non-Federal entities to provide the required information for the BIA management systems. Respondents to this information collection include State DOTs, Metropolitan Planning Organizations (MPOs), Tribal governments, regional transportation planning agencies, and county and local governments. The BIA bears the burden of developing the management systems in a manner that would incorporate any existing data in the most efficient way and without additional burdens to the public. These estimates only include burdens on the respondents to provide information that is not usually and customarily collected.

Where a substantial level of effort may be required of non-Federal entities to provide BIA management system information, the effort has been benchmarked to the number of miles of State, local or tribally owned roads or the number of State, local or tribally owned bridges within the IRR system. This approach has been applied to the pavement management system (PMS), the bridge management system (BMS), and the safety management system (SMS). For BIA implementation of the PMS, BMS, and SMS, the total annual burden estimate is 3,600 of the 5,600 hours per year. The level of burden on non-Federal entities for these management systems is modest since the agency will incorporate existing data into the system. Of these three systems, the most substantial burden is associated with the collection of data to implement the BMS. The BMS burden is estimated at 1,400 hours per year. The PMS and SMS burdens are estimated at 1,100 hours per year for each of these management systems.

For the congestion management system (CMS), the non-Federal burden, if applicable, will likely fall to the MPOs, and represents the need for the BIA to coordinate its management system with the MPOs, for those limited instances when a portion of its transportation system is within an MPO area. This results in a total annual burden estimate of 2000 hours for the IRR CMS.

Comments regarding the proposed information collection were received from the State DOT coalition, and

Caltrans. The State DOT coalition and Caltrans acknowledged States would be requested to provide information, and indicated such activities would represent a burden. The detailed extent of the burden would depend on the specific information requested and the process used to implement the management systems. The State DOT coalition encouraged a cooperative process using approaches that would avoid redundancy and duplication in implementing the management systems. The State DOT coalition also indicated that management systems should be implemented efficiently to control costs, by limiting the data collected to the minimum necessary to achieve IRR program goals.

The FHWA anticipated some burden on States and MPOs in the burden estimates prepared as part of the rulemaking. The State DOT coalition and Caltrans did not question the need for management systems or the FHWA's burden estimates. The FHWA believes that the value of the management systems information for transportation decisionmaking outweighs the burden of collecting it. Information provided by the management systems will enhance transportation investment decisions for the IRR program, improve the overall efficiency of the IRR transportation system, and provide information to be used in the new IRR program funding distribution formula. In addition, it will assist the FHWA in its stewardship and oversight roles. The FHWA has tried to keep the data collection burden to the lowest level possible, while still providing for the necessary data. In that regard, the FHWA believes the burden estimates to be fair and equitable. The BIA has the responsibility to develop the management systems in a manner that would incorporate any existing data in the most efficient way, and without additional burden to the public.

#### **National Environmental Policy Act**

The agency 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 the environment. An environmental impact statement is, therefore, not required.

#### **Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this action under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000, and believes that this action will have substantial direct effects on one or more Indian tribes.



Section 5 (b) of Executive Order 13175 states:

To the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless:

(1) Funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government; or

(2) The agency, prior to formal promulgation of the regulation,

(A) Consulted with Tribal officials early in the process of developing the proposed regulation.

The Executive Order states similar requirements for any regulation that has tribal implications and preempts tribal law.

As stated previously, this rulemaking is statutorily required under section 1115(d) of the TEA-21. While there are no specific additional dedicated funds for implementing this regulation, funds already available under the IRR program can be used for the development, establishment, and implementation of the management systems. The FHWA used a series of public information and consultation meetings (described in the section entitled, "Summary of Comments") and tribal transportation meetings to consult and coordinate with ITGs on this rulemaking, since its inception. At these meetings, the FHWA advised the tribes of the ANPRM and the NRPM, and encouraged them to submit comments and suggestions to the docket.

#### *Tribal Summary Impact Statement*

On January 8, 2003 (68 FR 1105), the FHWA published the NPRM, to solicit public comments concerning development of this proposed rule. Among the comments the FHWA received are the comments from ten ITGs, intertribal councils or tribal associations. These comments are summarized in the section entitled "Summary of Comments." Specific comments may be obtained by reviewing the materials in the docket at <http://dms.dot.gov>.

Pursuant to Executive Order 13175, during the development process for this final rule, the FHWA participated in a number of public information and consultation sessions with numerous representatives of ITGs throughout the country. The purpose of these sessions was to provide an overview of the rulemaking process and explain the FHWA's purpose and intent in developing the rule. These discussions were scheduled meetings with time and location published in the **Federal**

**Register** on January 30, 2003 (68 FR 4744). In addition, the FHWA made a presentation at the February 2003 Tribal Transportation Planning meeting in Billings, Montana.

Tribal comments and concerns raised at these meetings reflected the comments to the docket. They included lack of a dedicated source of funding, the relationship of the rulemaking to the DOI's negotiated rulemaking for the IRR program, lack of implementation details, concerns over cooperation and data sharing, the need to avoid duplication, and the functionality of nationwide management systems for use at the BIA regional or tribal level. These comments are addressed below.

Under this rule, responsibility for implementation of the nationwide management systems lies with the BIA, as the joint administrator of the IRR program. The rule also provides for the BIA to use IRR program funds to develop, maintain and operate the nationwide management systems. Tribal governments are not required to collect information or implement management systems, but have the option to do so. The development, maintenance and operation of management systems are an appropriate use of the IRR two percent planning and construction funds if an ITG has made the decision to implement tribal management systems.

Implementation of the nationwide management systems is mandated by the TEA-21 for the FLMA's, including the BIA, by the TEA-21. This requirement is completely separate and unrelated to the negotiated rulemaking required by section 202(d) of title 23, U.S.C., for the development of policy, procedures and a funding distribution formula for the IRR program. The FHWA has proceeded with this rule to satisfy the specific requirement of the TEA-21 for the development and implementation of management systems for transportation facilities funded under the FLHP.

Section 973.204(b) provides for the BIA and FHWA, in consultation with the Tribes, to develop implementation plans for each of the nationwide management systems. The implementation plans will include specific details regarding implementation of the nationwide management systems such as, but not limited to, overall goals and policies governing the management systems, each agency's responsibilities for developing and implementing the nationwide management systems, the implementation schedule, proposed data sources, and a cost estimate for implementing and operating the management systems. Development of

the implementation plans will also provide an opportunity to address ongoing cooperation and data sharing, and ways to avoid duplication with other FLMA's, States and MPO's. Additionally, as the implementation plans are developed, goals, policies and strategies can be formulated to assure that the nationwide management systems have the required levels of functionality for use at both the BIA and tribal levels.

#### **Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 13045 (Protection of Children)**

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This final rule is not economically significant and does not concern an environmental risk to health and safety that may disproportionately affect children.

#### **Executive Order 12630 (Taking of Private Property)**

This final rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### **Executive Order 13211 (Energy Effects)**

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because, although this action is considered to be a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects in 23 CFR Part 973**

Bridges, Congestion management, Grant program—transportation, Highways and roads, Indian Reservation roads, Management systems, Pavement management, Public lands, Safety management, Transportation.

■ For reasons set forth in the preamble, the Federal Highway Administration amends chapter I of title 23, Code of Federal Regulations, as set forth below.

Issued on: February 18, 2004.

Mary E. Peters,

Federal Highway Administrator.

■ 1. Add a new part 973 to subchapter L to read as follows:

**PART 973—MANAGEMENT SYSTEMS PERTAINING TO THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN RESERVATION ROADS PROGRAM**

**Subpart A—Definitions**

Sec.

- 973.100 Purpose.
- 973.102 Applicability.
- 973.104 Definitions.

**Subpart B—Bureau of Indian Affairs Management Systems**

- 973.200 Purpose.
- 973.202 Applicability.
- 973.204 Management systems requirements.
- 973.206 Funds for establishment, development and implementation of the systems.
- 973.208 Indian lands pavement management system (PMS).
- 973.210 Indian lands bridge management system (BMS).
- 973.212 Indian lands safety management system (SMS).
- 973.214 Indian lands congestion management system (CMS).

**Authority:** 23 U.S.C. 204, 315, 42 U.S.C. 7410 *et seq.*; 49 CFR 1.48.

**Subpart A—Definitions**

**§ 973.100 Purpose.**

The purpose of this subpart is to provide definitions for terms used in this part.

**§ 973.102 Applicability.**

The definitions in this subpart are applicable to this part, except as otherwise provided.

**§ 973.104 Definitions.**

*Alternative transportation systems* means modes of transportation other than private vehicles, including methods to improve system performance such as transportation demand management, congestion management, and intelligent transportation systems. These mechanisms help reduce the use of private vehicles and thus improve

overall efficiency of transportation systems and facilities.

*Elements* means the components of a bridge important from a structural, user, or cost standpoint. Examples are decks, joints, bearings, girders, abutments, and piers.

*Federal Lands Highway program (FLHP)* means a federally funded program established in 23 U.S.C. 204 to address transportation needs of Federal and Indian lands.

*Indian lands bridge management system (BMS)* means a systematic process used by the Bureau of Indian Affairs (BIA) or Indian Tribal Governments (ITGs) for analyzing bridge data to make forecasts and recommendations, and provides the means by which bridge maintenance, rehabilitation, and replacement programs and policies may be efficiently considered.

*Indian lands congestion management system (CMS)* means a systematic process used by the BIA or ITGs for managing congestion that provides information on transportation system performance and alternative strategies for alleviating congestion and enhancing the mobility of persons and goods to levels that meet Federal, State and local needs.

*Indian lands pavement management system (PMS)* means a systematic process used by the BIA or ITGs that provides information for use in implementing cost-effective pavement reconstruction, rehabilitation, and preventive maintenance programs and policies, and that results in pavement designed to accommodate current and forecasted traffic in a safe, durable, and cost-effective manner.

*Indian lands safety management system (SMS)* means a systematic process used by the BIA or ITGs with the goal of reducing the number and severity of traffic accidents by ensuring that all opportunities to improve roadway safety are identified, considered, implemented and evaluated, as appropriate, during all phases of highway planning, design, construction, operation and maintenance by providing information for selecting and implementing effective highway safety strategies and projects.

*Indian reservation road (IRR)* means a public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land that is not subject to fee title alienation without the approval of the Federal government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined

are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

*Indian Reservation Roads (IRR) program* means a part of the FLHP established in 23 U.S.C. 204 to address the transportation needs of federally recognized ITGs.

*Indian Reservation Roads transportation improvement program (IRRTIP)* means a multi-year, financially constrained list by year, State, and tribe of IRR-funded projects selected by ITGs that are programmed for construction in the next 3 to 5 years.

*Indian Reservation Roads transportation plan* means a document setting out a tribe's long-range transportation priorities and needs. The IRR transportation plan, which can be developed by either the tribe or the BIA on behalf of that tribe, is developed through the IRR transportation planning process pursuant to 23 U.S.C. 204 and 25 CFR part 170.

*Indian Tribal Government (ITG)* means a duly formed governing body of an Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village, or Community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

*Indian tribe (tribe)* means any Indian tribe, nation, band, pueblo, rancheria, colony, or community, including any Alaska Native Village, or regional or village corporation as defined or established under the Alaska Native Claims Settlement Act which is federally recognized by the U.S. government for special programs and services provided by the Secretary of the Interior to Indians because of their status as Indians.

*Intelligent transportation system (ITS)* means electronics, communications, or information processing used singly or in combination to improve the efficiency and safety of a surface transportation system.

*Life-cycle cost analysis* means an evaluation of costs incurred over the life of a project allowing a comparative analysis between or among various alternatives. Life-cycle cost analysis promotes consideration of total cost, to include maintenance and operation expenditures. Comprehensive life-cycle cost analysis includes all economic variables essential to the evaluation: Safety costs associated with maintenance and rehabilitation projects, agency capital cost, and life-cycle maintenance costs.

*Operations* means those activities associated with managing, controlling, and regulating highway traffic.

*Secretary* means the Secretary of Transportation.

*Serviceability* means the degree to which a bridge provides satisfactory service from the point of view of its users.

*State* means any one of the fifty States, the District of Columbia, or Puerto Rico.

*Transportation facilities* means roads, streets, bridges, parking areas, transit vehicles, and other related transportation infrastructure.

## **Subpart B—Bureau of Indian Affairs Management Systems**

### **§ 973.200 Purpose.**

The purpose of this subpart is to implement 23 U.S.C. 204 which requires the Secretary and the Secretary of each appropriate Federal land management agency to the extent appropriate, to develop by rule safety, bridge, pavement, and congestion management systems for roads funded under the FLHP.

### **§ 973.202 Applicability.**

The provisions in this subpart are applicable to the Bureau of Indian Affairs (BIA), the Federal Highway Administration (FHWA), and the Indian Tribal Governments (ITGs) that are responsible for satisfying these requirements for management systems pursuant to 23 U.S.C. 204.

### **§ 973.204 Management systems requirements.**

(a) The BIA, in consultation with the tribes, shall develop, establish and implement nationwide pavement, bridge, and safety management systems for federally and tribally owned IRRs. The BIA may tailor the nationwide management systems to meet the agency's goals, policies, and needs, after considering the input from the tribes, and using professional engineering and planning judgment to determine the required nature and extent of systems coverage consistent with the intent and requirements of this rule.

(b) The BIA and the FHWA, in consultation with the tribes, shall develop an implementation plan for each of the nationwide management systems. These plans will include, but are not limited to, the following: Overall goals and policies concerning the nationwide management systems, each agency's responsibilities for developing and implementing the nationwide management systems, implementation schedule, data sources, including the need to accommodate State and local data, and cost estimate.

(c) Indian tribes may develop, establish, and implement tribal

management systems under a self-determination contract or self-governance annual funding agreement. The tribe may tailor the management systems to meet its goals, policies, and needs, using professional engineering and planning judgment to determine the required nature and extent of systems coverage consistent with the intent and requirements of this rule.

(d) The BIA, in consultation with the tribes, shall develop criteria for cases in which tribal management systems are not appropriate.

(e) The BIA, in consultation with the tribes, or the tribes under a self-determination contract or self-governance annual funding agreement, may incorporate data provided by States and local governments into the nationwide or tribal management systems, as appropriate, for State and locally owned IRRs.

(f) The BIA, in consultation with the tribes, shall develop and implement procedures for the development, establishment, implementation and operation of nationwide management systems. If a tribe develops tribal management systems, the tribe shall develop and implement procedures for the development, establishment, implementation and operation of tribal management systems. The procedures shall include:

(1) A description of each management system;

(2) A process to operate and maintain the management systems and their associated databases;

(3) A process for data collection, processing, analysis and updating for each management system;

(4) A process for ensuring the results of the management systems are considered in the development of IRR transportation plans and transportation improvement programs and in making project selection decisions under 23 U.S.C. 204; and

(5) A process for the analysis and coordination of all management systems outputs to systematically operate, maintain, and upgrade existing transportation assets cost-effectively;

(g) All management systems shall use databases with a common or coordinated reference system that can be used to geolocate all database information.

(h) Existing data sources may be used by the BIA and the tribes to the maximum extent possible to meet the management system requirements.

(i) A nationwide congestion management system is not required. The BIA and the FHWA, in consultation with the tribes, shall develop criteria for determining when congestion

management systems are required for BIA or tribal transportation facilities providing access to and within the Indian reservations. Either the tribes or the BIA, in consultation with the tribes, shall develop, establish and implement congestion management systems for the transportation facilities that meet the criteria.

(j) The BIA shall develop an appropriate means to evaluate the effectiveness of the nationwide management systems in enhancing transportation investment decisions and improving the overall efficiency of the affected transportation systems and facilities. This evaluation is to be conducted periodically, preferably as part of the BIA planning process to assist the FHWA in evaluating the efficiency and effectiveness of the management systems as a component of the IRR program, and may include consultation with the tribes, as appropriate.

(k) The management systems shall be operated so investment decisions based on management system outputs can be accomplished at the BIA region and tribal level and can be utilized throughout the transportation planning process.

### **§ 973.206 Funds for establishment, development, and implementation of the systems.**

The IRR program management funds may be used to accomplish nationwide management system activities. For tribal management system activities, the IRR two percent tribal transportation planning or construction funds may be used. (Refer to 23 U.S.C. 204(b) and 204(j)). These funds are to be administered in accordance with the procedures and requirements applicable to the funds.

### **§ 973.208 Indian lands pavement management system (PMS).**

In addition to the requirements provided in § 973.204, the PMS must meet the following requirements:

(a) The BIA shall have PMS coverage for all federally and tribally owned, paved IRRs included in the IRR inventory.

(b) Where a tribe collects data for the tribe's PMS, the tribe shall provide the data to the BIA to be used in the nationwide PMS.

(c) The nationwide and tribal PMSs may be based on the concepts described in the AASHTO's "Pavement Management Guide."<sup>1</sup>

<sup>1</sup> "Pavement Management Guide," AASHTO, 2001, is available for inspection as prescribed at 49 CFR part 7. It is also available from the American Association of State Highway and Transportation

(d) The nationwide and tribal PMSs may be utilized at various levels of technical complexity depending on the nature of the pavement network. These different levels may depend on mileage, functional classes, volumes, loading, usage, surface type, or other criteria the BIA and ITGs deem appropriate.

(e) A PMS shall be designed to fit the BIA's or tribes' goals, policies, criteria, and needs using the following components, at a minimum, as a basic framework for a PMS:

(1) A database and an ongoing program for the collection and maintenance of the inventory, inspection, cost, and supplemental data needed to support the PMS. The minimum PMS database shall include:

(i) An inventory of the physical pavement features including the number of lanes, length, width, surface type, functional classification, and shoulder information;

(ii) A history of project dates and types of construction, reconstruction, rehabilitation, and preventive maintenance. If some of the inventory or historic data is difficult to establish, it may be collected when preservation or reconstruction work is performed;

(iii) A condition survey that includes ride, distress, rutting, and surface friction (as appropriate);

(iv) Traffic information including volumes and vehicle classification (as appropriate); and

(v) Data for estimating the costs of actions.

(2) A system for applying network level analytical procedures that are capable of analyzing data for all federally and tribally owned IRR in the inventory or any subset. The minimum analyses shall include:

(i) A pavement condition analysis that includes ride, distress, rutting, and surface friction (as appropriate);

(ii) A pavement performance analysis that includes present and predicted performance and an estimate of the remaining service life (performance and remaining service life to be developed with time); and

(iii) An investment analysis that:

(A) Identifies alternative strategies to improve pavement conditions;

(B) Estimates costs of any pavement improvement strategy;

(C) Determines maintenance, repair, and rehabilitation strategies for pavements using life cycle cost analysis or a comparable procedure;

(D) Performs short and long term budget forecasting; and

(E) Recommends optimal allocation of limited funds by developing a prioritized list of candidate projects over a predefined planning horizon (both short and long term).

(f) For any roads in the inventory or subset thereof, PMS reporting requirements shall include, but are not limited to, percentage of roads in good, fair, and poor condition.

#### **§ 973.210 Indian lands bridge management system (BMS).**

In addition to the requirements provided in § 973.204, the BMS must meet the following requirements:

(a) The BIA shall have a nationwide BMS for the federally and tribally owned IRR bridges that are funded under the FLHP and required to be inventoried and inspected under 23 CFR 650, subpart C, National Bridge Inspection Standards (NBIS).

(b) Where a tribe collects data for the tribe's BMS, the tribe shall provide the data to the BIA to be used in the nationwide BMS.

(c) The nationwide and tribal BMSs may be based on the concepts described in the AASHTO's "Guidelines for Bridge Management Systems."<sup>2</sup>

(d) A BMS shall be designed to fit the BIA's or tribe's goals, policies, criteria, and needs using the following components, as a minimum, as a basic framework for a BMS:

(1) A database and an ongoing program for the collection and maintenance of the inventory, inspection, cost, and supplemental data needed to support the BMS. The minimum BMS database shall include:

(i) The inventory data described by the NBIS (23 CFR part 650, subpart C);

(ii) Data characterizing the severity and extent of deterioration of bridge components;

(iii) Data for estimating the cost of improvement actions;

(iv) Traffic information including volumes and vehicle classification (as appropriate); and

(v) A history of conditions and actions taken on each bridge, excluding minor or incidental maintenance.

(2) A systematic procedure for applying network level analytical procedures that are capable of analyzing data for all bridges in the inventory or any subset. The minimum analyses shall include:

(i) A prediction of performance and estimate of the remaining service life of structural and other key elements of each bridge, both with and without intervening actions; and

(ii) A recommendation for optimal allocation of limited funds by developing a prioritized list of candidate projects over a predefined planning horizon (both short and long term).

(e) The BMS may include the capability to perform an investment analysis (as appropriate, considering size of structure, traffic volume, and structural condition). The investment analysis may include the ability to:

(1) Identify alternative strategies to improve bridge condition, safety and serviceability;

(2) Estimate the costs of any strategies ranging from maintenance of individual elements to full bridge replacement;

(3) Determine maintenance, repair, and rehabilitation strategies for bridge elements using life cycle cost analysis or a comparable procedure; and

(4) Perform short and long term budget forecasting.

(f) For any bridge in the inventory or subset thereof, BMS reporting requirements shall include, but are not limited to, percentage of non-deficient bridges.

#### **§ 973.212 Indian lands safety management system (SMS).**

In addition to the requirements provided in § 973.204, the SMS must meet the following requirements:

(a) The BIA shall have a nationwide SMS for all federally and tribally owned IRR and public transit facilities included in the IRR inventory.

(b) Where a tribe collects data for the tribe's SMS, the tribe shall provide the data to the BIA to be used in the nationwide SMS.

(c) The nationwide and tribal SMS may be based on the guidance in "Safety Management Systems: Good Practices for Development and Implementation."<sup>3</sup>

(d) The BIA and ITGs shall utilize the SMSs to ensure that safety is considered and implemented as appropriate in all phases of transportation system planning, design, construction, maintenance, and operations.

(e) The nationwide and tribal SMSs may be utilized at various levels of

<sup>2</sup> "Guidelines for Bridge Management Systems," AASHTO, 1993, is available for inspection as prescribed at 49 CFR part 7. It is also available from the American Association of State Highway and Transportation Officials (AASHTO), Publication Order Dept., P.O. Box 96716, Washington, DC 20090-6716 or online at <http://www.transportation.org/publications/bookstore.nsf>.

<sup>3</sup> "Safety Management Systems: Good Practices for Development and Implementation," FHWA and NHTSA, May 1996, may be obtained at the FHWA, Office of Safety, Room 3407, 400 Seventh St., SW., Washington, DC 20590, or electronically at <http://safety.fhwa.dot.gov/media/documents.htm>. It is available for inspection and copying as prescribed at 49 CFR part 7.

complexity depending on the nature of the IRR facility involved.

(f) An SMS shall be designed to fit the BIA's or ITG's goals, policies, criteria, and needs using, as a minimum, the following components as a basic framework for an SMS:

(1) A database and an ongoing program for the collection and maintenance of the inventory, inspection, cost, and supplemental data needed to support the SMS. The minimum SMS database shall include:

(i) Accident records;

(ii) An inventory of safety hardware including signs, guardrails, and lighting appurtenances (including terminals); and

(iii) Traffic information including volume and vehicle classification (as appropriate).

(2) Development, establishment and implementation of procedures for:

(i) Routinely maintaining and upgrading safety appurtenances including highway-rail crossing warning devices, signs, highway elements, and operational features where appropriate;

(ii) Routinely maintaining and upgrading safety features of transit facilities;

(iii) Identifying and investigating hazardous or potentially hazardous transportation system safety problems, roadway locations and features; and

(iv) Establishing countermeasures and setting priorities to correct the identified hazards and potential hazards.

(3) A process for communication, coordination, and cooperation among the organizations responsible for the roadway, human, and vehicle safety elements;

(4) Development and implementation of public information and education activities on safety needs, programs, and countermeasures which affect safety on the BIA's and ITG's transportation systems; and

(5) Identification of skills, resources and training needs to implement safety programs for highway and transit

facilities and the development of a program to carry out necessary training.

(g) While the SMS applies to all federally and tribally owned IRRs in the IRR inventory, the extent of system requirements (*e.g.*, data collection, analyses, and standards) for low volume roads may be tailored to be consistent with the functional classification of the roads. However, adequate requirements should be included for each BIA functional classification to provide for effective inclusion of safety decisions in the administration of transportation by the BIA and ITGs.

(h) For any transportation facilities in the IRR inventory or subset thereof, SMS reporting requirements shall include, but are not limited to, the following:

(1) Accident types such as right-angle, rear-end, left turn, head-on, sideswipe, pedestrian-related, run-off-road, fixed object, and parked vehicle;

(2) Accident severity per year measured as number of accidents with fatalities, injuries, and property damage only; and

(3) Accident rates measured as number of accidents (fatalities, injuries, and property damage only) per 100 million vehicle miles of travel, number of accidents (fatalities, injuries, and property damage only) per 1000 vehicles, or number of accidents (fatalities, injuries, and property damage only) per mile.

#### **§ 973.214 Indian lands congestion management system (CMS).**

(a) For purposes of this section, congestion means the level at which transportation system performance is no longer acceptable due to traffic interference. The BIA and the FHWA, in consultation with the tribes, shall develop criteria to determine when a CMS is to be implemented for a specific federally or tribally owned IRR transportation system that is experiencing congestion. Either the tribe or the BIA, in consultation with the

tribe, shall consider the results of the CMS in the development of the IRR transportation plan and the IRR TIP, when selecting strategies for implementation that provide the most efficient and effective use of existing and future transportation facilities to alleviate congestion and enhance mobility.

(b) In addition to the requirements provided in § 973.204, the CMS must meet the following requirements:

(1) For those BIA or tribal transportation systems that require a CMS, consideration shall be given to strategies that reduce private automobile travel and improve existing transportation system efficiency. Approaches may include the use of alternate mode studies and implementation plans as components of the CMS.

(2) A CMS will:

(i) Identify and document measures for congestion (*e.g.*, level of service);

(ii) Identify the causes of congestion;

(iii) Include processes for evaluating the cost and effectiveness of alternative strategies;

(iv) Identify the anticipated benefits of appropriate alternative traditional and nontraditional congestion management strategies;

(v) Determine methods to monitor and evaluate the performance of the multi-modal transportation system; and

(vi) Appropriately consider the following example categories of strategies, or combinations of strategies for each area:

(A) Transportation demand management measures;

(B) Traffic operational improvements;

(C) Public transportation improvements;

(D) ITS technologies; and

(E) Additional system capacity.

[FR Doc. 04-4055 Filed 2-26-04; 8:45 am]

BILLING CODE 4910-22-U