

**TESTIMONY OF
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CHAIR OF THE A.F.N. HUMAN RESOURCES COMMITTEE**

**BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
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HEARING ON ALASKA NATIVE ISSUES

Mr. Chairman and Members of the Committee, thank you for the opportunity to speak today on goals of the Alaska Native community for the 107th Congress. My name is Loretta Bullard. I am President of Kawerak, Inc., which is a non-profit consortium of 20 federally recognized Alaska Native villages in northwestern Alaska. Kawerak administers most BIA services in our region by compact under Title IV of PL 93-638, and we have recently entered a Title I contract to operate the BIA Indian Reservation Roads program for 18 villages. My remarks therefore come from the perspective of a BIA tribal contracting organization.

I would like to address three Alaska-specific issues, and then touch briefly on several national legislative issues.

I. Indian Reservation Roads Funding

First, AFN has included in its federal packet this year a request that \$50 million in Indian Reservation Roads funds be earmarked for Alaska, and that Alaska be taken out of the national funding distribution system for this program. I have attached to my written testimony a copy of our justification paper for this request.

Mr. Al Ketzler, Sr. of the Tanana Chiefs Conference, Mr. Gideon James of Venetie, and myself have served as the Alaska representatives to the IRR negotiated rule-making for the past two years, and I can only say the experience has been extremely frustrating. Although I believe the rule-making will eventually result in improved program regulations, there is entrenched resistance within the Bureau of Indian Affairs to making needed changes in the funding system.

The existing funding formula is deeply flawed. Fifty percent of the funding is allocated according to the costs of making improvements in the BIA road system, and 30% according to "Vehicle Miles Traveled," which is a measure of usage. This may superficially make sense, until you realize that both of these components – 80% of the formula – *is linked to an inventory limited to existing BIA-owned roads*. Thus the BIA allocates the funds primarily according to where it has built roads in the past, disregarding the need for new construction or the transportation needs of tribes that have historically been underserved. The remaining 20% of the formula is distributed by population, which does not address the imbalance because in general it is the small and medium population tribes

that have not been served by the IRR program.

I will note that for Alaska, Congress used appropriations act riders in the mid 1990's to partially correct this problem. Congress required the BIA to include planned roads from a 1993 Juneau Area Plan in its inventory for funding purposes. Without that rider, Alaska would have received next to nothing under the IRR formula. However, the 1993 BIA Area Plan only skimmed the surface of actual needs, and left many villages out altogether. No one actually visited the villages to do roads planning.

To illustrate the unfairness of the formula, the BIA's identified IRR construction cost need in 1999 was about \$6.4 billion. \$204.1 million was available nationally for IRR construction. The amounts have since gone up, but I am using 1999 figures because that was the last year the formula distribution was unaffected by the negotiated rule-making. At the 1999 appropriated amount it would take about 31 years nationally to meet the IRR construction cost need. One would think all tribes and BIA Regions would thus be getting about 3.2% of their need met every year, and about 19% over the six-year period of TEA-21.

But when we ran the equivalent numbers for Kawerak's villages, we discovered that we were on about an 80-year plan, and this is using the BIA's superficial inventory of need and undercounted construction costs. The formula only generates about 1/80th of our identified need annually. This is because the population and VMT components of the formula divert money away from tribes with small populations or undeveloped roads systems, regardless of how badly they may need a particular project. Alaska as a whole was getting its identified construction need met at 1.8% annually, Navajo Region at about 4%, and Eastern Oklahoma at 6.1 %.

While this figures illustrate that the IRR program nationally is badly under- funded, they also underscore that the BIA is not meeting the need evenly. A formula distribution that meets the need of some regions twice or even three times as fast as other regions is badly flawed.

In fact, the vast majority of tribes nationally are not allocated enough funds by the formula to realistically do much if any work within a highways act authorization cycle. This is because road projects can't generally be done 2 or 3% at a time. A hypothetical small tribe that only needs one project is only generating a tiny fraction of the cost for its project in any year. In Alaska, it costs between 1 and 2 million dollars per mile to build a two-lane gravel road to FHWA standards. The annual formula share of most Alaska tribes is less than \$100,000, and in many instances less than \$25,000. This not just true in Alaska -22 of the tribes in Portland Area were attributed less than \$25,000 in FY 1999. It is not feasible and would not be cost efficient to build a road project \$25,000 at a time.

Historically, in Alaska the BIA bundled funds into fairly large-scale projects and only served a few of the 220-plus eligible villages in any authorization cycle. In other Regions, the funds generated by small tribes are also pooled with other tribes, typically larger tribes that have annual construction activity. In theory, the BIA could keep track of which tribes' funding goes where to ensure that over time all tribes received their full construction share, but it would literally take at least 80 to 100years of

tracking to make the system work out. A formula that only works if applied over multiple generations, is broken.

Another fundamental problem with the IRR funding system is that it is based on a massively complex inventory and data management system that must be updated regularly. The tribes and BIA program staff have to do a considerable amount of planning and inventory management work in order to fully participate in the program. But the BIA allocates its 2% tribal planning funds and its program management funds to the regions according to how much construction funding they receive. The problem with this is a region or tribe doesn't do well in its construction allocation unless it has already done its inventory development and planning work.

Further, the cost to the BIA Region of program management work has little to do with the amount of construction funding it receives. I can assure you that BIA program management costs in Alaska, for 227 tribes mostly only reachable by air, is a lot higher per IRR construction mile than it would be in more geographically compact regions serving fewer tribes.

The IRR funding system is designed to work only for tribes that have historically had large BIA construction programs and generate enough funding under the formula to have projects every year - which is probably no more than 10% of the tribes nationally.

Although the proposed IRR regulations developed in the negotiated rule-making will ask for comment on two alternative formulas, one of which Alaska supports, I do not believe the BIA will change the system sufficiently to make it work fairly. The senior federal officials at the negotiated rule-making never defined the task of the rule-making as developing a "new" formula as opposed to "a" formula. One of the formulas to be published for comment is just the old formula, with some improvements to the inventory management system the BIA was planning to make anyway. It is very clear which formula BIA Central Office supports.

We believe Alaska would be better served outside the national system altogether than to continue under the old formula. In fact, it is very difficult to develop a single formula that adequately addresses Alaska's needs and those of reservation-based tribes with developed BIA road systems. Their needs are mostly to maintain and upgrade an existing road network. Most of our needs are for new construction of relatively short roads, i.e. access roads to new housing projects, landfills, mineral resources, etc. Virtually any development undertaken in our communities requires some new road construction, because so few developed roads exist now. Village Alaska also has a huge unmet need for boardwalks, trails, winter trail staking, dust abatement and similar projects that are allowable uses of IRR funds but do not generate funds under the formula.

Although a \$50 million earmark may seem high out of a \$275 million appropriation amount, I believe it is actually low if Alaska Native villages had fully developed inventories of eligible projects and if the BIA was using up-to-date construction cost data. Alaska has been so under-served by the IRR program, few people knew how to make the system work. If nothing else, the negotiated rule-making is changing that.

Alcohol Enforcement Jurisdiction

The second goal I wish to address is that Congress legislatively extend tribal enforcement jurisdiction for alcohol and substance abuse violations. As this Committee is well aware, in Alaska our villages do not have reservations. There is little or no formal "Indian Country" within which our tribal governments exercise jurisdiction. Most Native land is owned by corporations created under the Alaska Native Claims Settlement act, and is not tribal land, per se.

The federal courts and to some extent the state courts recognize that our tribal governments have some judicial authority, most notably in the context of children's cases under the Indian Child Welfare Act and matters that are purely internal tribal matters. It is still unclear whether jurisdiction over tribal internal matters extends to core health and safety problems or to juvenile proceedings, but it is unlikely the courts would recognize that our tribes have much authority over individuals outside of the context of ICWA and family matters.

This creates a gaping hole in government services at the village level, because the state law enforcement and judicial systems are not designed to deal with minor criminal problems in remote villages and do not have the resources to do so. Kawerak and several of the other regional Native organizations developed proposed statutory language last year that would ensure our villages have tribal jurisdiction to enforce alcohol and substance abuse laws within their communities. The legislation ran into objections from the state and was not introduced in the last Congress.

We are simply asking that Congress confirm the jurisdiction of tribal governments in Alaska to deal with alcohol and drug problems. I do not need to detail the social costs to rural Alaska caused by alcohol and drugs. It is astronomic, and the state system is too remote and under-funded to address the problem on a day-to-day basis. Although the state allows villages to ban possession of alcohol under state law, state local option laws can only be enforced in state courts in the regional centers. Enforcement is only by state officials, because even city governments, where they exist, cannot afford to pay for the transportation and prosecution costs. There are no municipal courts in Alaska, and many villages have no law enforcement at all except for the state troopers based in the regional centers. The state will never have the resources to provide magistrates and peace officers in every village.

Alcohol and drug offenses, particularly by juvenile offenders, must be handled quickly and close to home, or the problems escalate. The tribal governments are the only entities in position to do this.

As proposed, our language would require that a village have consistent tribal and state "local option" alcohol laws. The village's territory for enforcement purposes would be its core township as defined in ANCSA. The details of the language could be worked out, but our village tribal governments need the clear authority to deal with alcohol and substance abuse problems at home.

Federal Land Management Contracting

The third Alaska issue I would like to address is our continuing request that Congress expand

self-governance contracting in Alaska to allow tribal organizations to contract some Interior Department functions, in addition to the BIA programs. This should extend all the way to managing park or wildlife refuge units.

Part of the background of this request is that when the Alaska National Interest Lands Conservation Act (ANILCA) expanded the park and refuge system in Alaska in 1980, Congress also provided a local hire preference for jobs within the federal conservation system units. Section 1308 of ANILCA provided that people with special knowledge or expertise because of their history in the area were eligible for hire outside normal civil service rules. Sections 1306 and 1307 of ANILCA also provided a preference for using Native lands for federal facilities, and a preference to Native corporations in providing visitor services. With the exception of putting facilities on Native lands, the Interior Department has not lived up to these promises.

Title IV or PL 93-638, added in 1994, theoretically opened the door to Native compacting of non-BIA Interior Department functions, but the Interior Department has taken a very narrow view of this law. Essentially they have concluded that the only functions the tribes have a right to compact are specifically Native programs they already had the right to contract. Everything else is discretionary with the agency, and they have not exercised their discretion to allow compacts.

Kawerak actually had the first Title IV compact agreement with the National Park Service in the country, in 1996, which was funded from the NPS Beringia project and was used for our Eskimo Heritage program. We viewed this as an annual agreement that would be renewed so long as we provided the service. NPS treated it as a grant and phased it out after a couple of years.

Senator Murkowski worked hard on the local hire issue; we appreciate SB 748 regarding Native hire last year, which was enacted as P.L. 106-488. Even if the NPS and Fish & Wildlife do improve their hiring statistics, they are unlikely to train and promote Natives to management positions.

We believe legislation creating a demonstration project for actual Native contracting of the federal land-management operations is needed. Please bear in mind that in many places Alaska Native villages are surrounded by federal conservation units; what may seem like wilderness to people here in D.C. is often the backyard of Alaska Natives. As a people, we are highly reliant on fish, game and plant resources for food and for sustaining our way of life generally. Subsistence largely defines who we are. No one is more concerned about conservation than we.

AFN developed proposed legislation last year that would create up to 12 pilot projects for federal lands contracting in Alaska, based on the number of Alaska Native regions. It was written broadly enough to encourage different types of contracts. In our region for example, there is just one park system unit – the Bering Land Bridge National Monument. It might be suitable for Kawerak or another tribal organization to manage, as a unit. But elsewhere tribal organizations would likely be more interested in contracting the federal subsistence management functions, or other particular programs.

Congressman Don Young introduced a bill last year, H.R. 2804, that tracked AFN's proposal.

Some of the non-profit lawyers are working with his staff on revisions, and I expect it to be reintroduced in this Congress. We hope that companion legislation will be introduced and passed in the Senate.

Before concluding, I would like to touch briefly on a few national Indian priorities: First, I would like to express appreciation to Senator Campbell and the co-sponsors of S.344, a bill to amend the Transportation Equity Act for the 21st Century with respect to Indian tribes. We fully support this legislation, and in particular the creation of a demonstration project for tribes to contract the IRR program directly from the Department of Transportation. Although not related to S.344, I would also urge Congress to increase the funding for roads maintenance in the BIA budget. One of the problems with the IRR program is that because maintenance is so poorly funded, at about \$26 million nationally, the IRR construction budget is being used for deferred maintenance.

Second, Congressman Don Young of Alaska is introducing a bill to make technical amendments to PL 93-638 regarding contract support costs. This proposed legislation would enable tribal contractors with stable indirect cost rates to receive full contract support as part of their base funding, but would limit future increases in contract support to the inflation rate. We believe this is a reasonable approach. The current system where contract support is capped in the appropriations acts at levels that are 88% or 90% of actual costs causes program funds to be redirected for administrative overhead, but does little or nothing to encourage savings.

Third, Congressman Young is also introducing amendments to the Indian Child Welfare Act. This bill would clarify the jurisdictional provisions of the Act and would also impose deadlines on tribal interventions and the revocation of consents to adoptions. The Indian Child Welfare Act has been one of the great success stories of federal legislation regarding Native Americans, but it periodically comes under political attack. It in fact has some flaws that could be corrected. Although Kawerak has not done a section-by-section analysis of the latest proposed amendments, we agree with Congressman Young's approach and believe that this Congress should enact ICWA amendments.

Fourth, an informal task force of self-governance tribal leaders and attorneys is working on proposed amendments to Title IV of PL 93-638. Title IV is rather short, and its lack of detail led to unnecessary impasse issues in the Title IV negotiated rule-making. These proposed amendments would make Title IV more consistent with Title V. They are a work in progress, and should be ready for submission to both Houses of Congress by August.

Mr. Chairman, this concludes my remarks. Thank you again for the opportunity to testify.

ATTACHMENT I
To the Testimony of Loretta Bullard
Senate Indian Affairs Committee
May 10,2001

ALASKA SET-ASIDE OF INDIAN RESERVATION ROADS FUNDS

AFN urges Congress to allocate \$50 million annually for the Indian Reservation Roads Program in Alaska.

Alaska Native villages have always been statutorily eligible to participate in the Indian Reservation Roads program, but they have never received an allocation from the Bureau of Indian Affairs which fairly reflects the high costs of construction in Alaska or the fact Alaska Native villages are starting from virtually a zero base of ground transportation infrastructure. AFN believes it unlikely that the BIA will ever treat Alaska equitably in funding this program, unless Alaska funding is earmarked by Congress.

Virtually every development project in rural, Native Alaska requires at least some road construction. Roads are needed for new housing projects, for landfills, for sewage treatment facilities, and for virtually any expansion undertaken by a community not already on the road system. Further, there is huge unmet need for boardwalks, winter trail staking, winter road maintenance, and similar projects which are eligible for IRR funds, but which are not funded by the BIA's allocation system.

The BIA's existing "relative need" formula simply does not take Alaska's needs into account. Although Congress required the BIA to count planned roads in the Juneau Area Transportation Plan in the national inventory for funding purposes, and the Bureau does so, in virtually every other respect the national funding methodology appears tailored to keep Alaska's share artificially low. Some of the flaws of the existing system are:

– Fully 80% of the funding is allocated based on an inventory of existing BIA-owned roads. For Native villages that have no roads, this appears to be the opposite of a true needs-based formula. The BIA treats the program as a deferred maintenance program for roads it owns in the Lower 48 states, rather than as a new construction program.

– Alaska's planned roads are not given credit for "vehicle miles traveled," which is 30% of the formula.

– In Alaska, the BIA normally will not take ownership of the new roads it builds, and thus its new roads are not added to the inventory for funding purposes.

– The BIA excludes the Native population in Anchorage and Fairbanks from its population data, which constitutes 20% of the formula, even though the entire state is considered a BIA service area for all other BIA programs.

– In determining construction costs, which account for 50% of the formula, the BIA data takes no account of the costs of project mobilization in remote areas or of the particular costs of building roads on permafrost or on muskeg. In short, cost components that are particularly high in Alaska are not even included as components when the BIA runs the data.

– The funding formula depends on a massively complex inventory and cost reporting system which requires annual updating, is subject to manipulation at many levels, and is not verifiable by outside parties.

To all appearances, the BIA funding system is designed to protect tribes that are already in the IRR system and allow them to expand their road programs, while effectively locking out tribes that are not in the system. The planning and reporting requirements necessary to make the inventory system and funding formula work are un-funded mandates for tribes that do not already have an annual road construction program. Alaska villages have historically received only about \$1300 per year in IRR planning funds¹. They are competing against tribes that have construction projects every year, and fully staffed tribal transportation departments.

Representatives from Kawerak, the Tanana Chiefs Conference, the Native Village of Venetie, BBNA/Curyang (Dillingham), and the Sitka Community Association participated in the IRR negotiated rule-making, which began in March of 1999 and concluded its work on proposed regulations in December of 2000. Although progress was made, particularly in regard to program regulations, no permanent formula was agreed upon. The Negotiated Rule-Making Committee decided to publish two proposed funding formulas for public comment. One option, the "Modified Relative Need Formula," is essentially a "no change" option. It would make some improvements in the BIA's calculation of road construction costs but would otherwise leave the old relative need formula in place. By imposing restrictions to additions to the BIA road inventory, this option would make the situation worse for Alaska Native villages.

Alaska representatives at the IRR Rule Making helped develop the other formula option, called the "New Relative Need Formula," which would provide a small minimum allocation for all tribes to meet un-funded mandates for participating in the program, expand the inventory so that all tribes' ground transportation needs are counted, and otherwise make improvements to the formula.

However, the "no change" formula is clearly preferred by BIA Central Office. It was drafted by representatives of tribes that receive the most funding and by BIA staff. Unless the composition of the BIA administration changes, there is virtually no chance that the BIA will use the New Relative Need Formula supported by Alaska as the basis for the permanent formula.

Alaska's lack of roads makes our villages unique compared to Lower 48 tribes. It is in fact

¹Interim funding allocations resulting from the IRR Negotiated Rule-Making in FY 2000 and FY 2001 made additional transportation planning funds available for those years.

very difficult to develop a national formula. Most of Alaska's needs are for new construction, not for improvement of an existing highway system. We often need improved trails or single lane roads rather than roads built to FHWA standards. The remoteness of our villages, our environmental extremes, and the cost of mobilizing construction projects off the existing road system make it difficult to develop one formula that fits Alaska Native villages and also tribes in the Lower 48 states.

For these reasons AFN believes an Alaska set-aside is appropriate. An increase to Alaska of \$50 million is not unreasonable given the costs of construction in rural Alaska, and the number of eligible villages.