TESTIMONY
OF THE
STANDING ROCK SIOUX TRIBE
PRESENTED BY
PETE RED TOMAHAWK,
TRANSPORTATION DIRECTOR
AND
INDIAN RESERVATION ROADS (IRR)
PROGRAM COORDINATING COMMITTEE
CHAIRMAN
BEFORE THE
UNITED STATES SENATE COMMITTEE
ON INDIAN AFFAIRS

July 12, 2007

OVERSIGHT HEARING ON TRIBAL TRANSPORTATION ISSUES IN INDIAN COUNTRY

I. Introduction

Good morning Mr. Chairman and Members of the Committee on Indian Affairs. My name is Pete Red Tomahawk. I am the Standing Rock Sioux Transportation Director. I am the twice-elected Chairman of the Indian Reservation Roads (IRR) Program Coordinating Committee, the Tribal advisory body established in 2005 by BIA regulations for the IRR Program to provide advice to the BIA and Federal Highway Administration (FHWA) regarding the IRR Program. I am also the Chairman of the Northern Plains Tribal Technical Assistance Program which represents 26 Tribes in North Dakota, South Dakota, Wyoming, Montana, and Nebraska, and the Native American Injury Prevention Coalition which distributed thousands of child car seats donated by Ford Motor Company to Indian families. I am also the former Co-Chairman of the joint Tribal-Federal Transportation Equity Act for the 21st Century (TEA-21) Negotiated Rulemaking Committee which drafted the BIA's regulations for the IRR Program before they were finalized by the Department of the Interior. I have worked in the Tribal transportation field for over 21 years.

I want to express my condolences and those of the Standing Rock Sioux Tribe to the family of Senator Craig Thomas and to this Committee. I was saddened to hear of the death of this admired man. Cancer has touched me and my family. Both my brother Wilbur and I are cancer survivors. I have the highest respect for Senator Thomas' dedicated public service to the people of Wyoming and to this country. He will be missed.

The Standing Rock Sioux Reservation straddles North and South Dakota. We have approximately 11,000 enrolled members, more than 2,500 miles of Indian Reservation Roads and a land base of 2.3 million acres. The Lewis and Clark Trail runs through the

Communities of Cannon Ball, Fort Yates, Kenel and Wakpala, four of our eight districts. The Standing Rock Sioux Tribal Council and our Chairman, Ron His Horse Is Thunder, recognize the importance of transportation infrastructure as a key to our Tribe's future economic and social well being.

The Tribe is working with other transportation stakeholders, the States of North Dakota and South Dakota, county governments and the Federal government, to improve our transportation system. For that reason, the Tribe has assumed responsibility for the Secretary of the Interior's IRR Program duties under an historic agreement with the FHWA as authorized by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). In May 2007, the Tribal Council elected to assume the Secretary's duties for the BIA Road Maintenance Program which the Tribe will carry out under an Indian Self-Determination Act (ISDA) contract beginning in FY 2008.

II. Key Recommendations to Improve Tribal Transportation Policies

Nearly 20 years ago, this Committee introduced legislation to overhaul the Indian Self-Determination Act. The legislation, which became P.L. 100-472, recognized the growing capability of Tribes to assume control over Federal programs. The Indian Self-Determination Act empowered Indian Tribes by transferring control to the Tribes and providing them the financial resources to succeed. The same thing must happen in the field of transportation. What this Committee said in 1987 is true in 2007:

> "The conditions for successful economic development on Indian lands are essentially the same as for any other predominantly rural community. There must be community stability, including adequate law enforcement and judicial systems and basic human services. ***There must be adequate infrastructure including roads, safe water and waste disposal systems, and power and communications utilities***. When these systems are in place, Tribes are in the best position to implement economic development plans, taking into account the available natural resources, labor force, financial resources and markets."[1]

Our key recommendations to Congress and the Federal agencies to improve transportation policies in Indian country generally, and for the IRR Program in particular, which I elaborate upon more fully in my testimony, are as follows:

1. Fund the IRR Program for the next reauthorization in installments that increase annually by at least $25 million from $475 million in FY 2010 to $600 million in FY 2015, and restore the obligation limitation deduction exemption that existed for the IRR Program under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA); increase funding for the IRR Bridge Program from $14 million to $50 million in the next reauthorization with increases of at least $10 million annually;

[1] S. Rep. No. 100-274, 100th Cong., 1st Sess., p. 4.

2. Increase funding for the BIA Road Maintenance Program to at least $150 million annually to promote traffic safety and to ensure that the Federal and Tribal investment in transportation infrastructure is maintained;

3. Enforce the statutory requirement in SAFETEA-LU which mandates that the BIA must make IRR Program funds "immediately available" for the use of Indian Tribes within 30 days of the BIA's receipt of the funds from the FHWA;

4. Simplify the award process by which Federal transportation funds are distributed to Indian Tribes by creating uniform grant eligibility, application, and administration criteria;

5. Develop model funding agreements for use by the Department of the Interior and the Department of Transportation to facilitate the efficient transfer of transportation funding and program authority to Indian Tribes;

6. Insist that the BIA and FHWA complete the comprehensive national transportation facility inventory update authorized in SAFETEA-LU to properly document all Tribal transportation facilities and to protect the integrity of the IRR Program funding formula;

7. Encourage the President to fill the position of Deputy Assistant Secretary for Tribal Government Affairs established under SAFETEA-LU;

8. Increase the number of Department of Transportation programs which Tribes may participate in as direct funding recipients from the Federal government rather than as sub-recipients through the States (e.g., Safe Routes to Schools Program, High Risk Rural Roads Program, and the Highways for Life Program);

9. Establish a Federal Lands Highways Safety Program for Indian Reservation Roads, establish a Tribal set aside for the High Risk Rural Road Program, and increase funding for the Federal Transit Administration's (FTA) Tribal Transit Grant Program to $50 million annually;

10. Increase funding to the successful Tribal Transportation Assistance Programs (TTAPs) to at least $2.5 million annually to increase technical training and promote awareness in Indian country of "best practices" in transportation planning, design, construction, maintenance, and highway safety measures;

11. Promote the use of innovative financing techniques in standard Indian

Self-Determination contracts and self-governance compacts to provide Tribal governments with better tools to reduce their road construction backlog; and

12. Carry out right-of-way reform in Indian country to reduce costs and expedite the design, construction and reconstruction of Tribal roads and bridges.

The Indian Reservation Roads Program is predominantly a rural roads program. Congress should invest in highway and surface transportation projects in rural areas as well as metropolitan areas. If rural America and Indian country are to prosper, there must be rural connectivity and reliable access to the national transportation system.

III. Tribal Transportation Successes

Indian Tribes have achieved many successes in the transportation field over the last several years. More than ever before, Tribes are working in partnership with local government and State departments of transportation on mutually beneficial projects. With the enactment of SAFETEA-LU, Tribes are working on a government-to-government basis with the Federal Highway Administration (FHWA) and the BIA to improve transportation systems in Indian country. Indian Tribes have:

- taken greater control of transportation programs: five Indian Tribes, including the Standing Rock Sioux Tribe, negotiated historic IRR Program and funding agreements with FHWA, as authorized under SAFETEA-LU, to assume the Secretary of the Interior's duties for the IRR Program;

- assumed the authority to approve PS&E (plans, specification & estimate) packages, thereby maintaining better control over construction scheduling and cost;

- used the authority under SAFETEA-LU to allocate up to 25% of their annual IRR Program allocation for road maintenance needs to maintain Tribal infrastructure built with IRR Program funds;

- witnessed the joint Federal-Tribal initiation of SAFETEA-LU's Tribal Transit Grant Program which was a model of government-to-government relations. The Federal Transit Administration (FTA) consulted with Indian Tribes, responded favorably to Tribal recommendations, received applications from nearly 100 Indian Tribes, and awarded over 60 transit grants to eligible Tribal recipients in FY 2007;

- collaborated with Members of Congress and FHWA Administrator Capka to successfully reverse an FHWA policy that would have prevented Tribes from being eligible sub-recipients of SAFETEA-LU's Safe Routes to Schools Program grants. Tribal access to these funds will permit Tribes to contract with States to

promote, develop and improve safe walking and bike routes to schools for elementary and middle-school children;

- collaborated with States on comprehensive highway safety and transportation and land use plans (NDDOT and Standing Rock), worked on cooperative ventures to improve traffic crash reporting on Indian reservations (SDDOT and the State's Indian Tribes); and jointly worked on construction, employment and materials testing (Eastern Shoshone and Northern Arapaho Tribes and Wyoming DOT);

- partnered with State DOTs on IRR Program highway projects funded through the Public Lands Highway Discretionary Grant Program which brings additional capital to Indian country by financing projects that otherwise could not be built by Tribal governments from other funding sources;

- instituted safety measures such as the child restraints and reduced infant and child deaths, cutting these rates dramatically; and

- brought third-party lenders to Indian country to help Tribes finance road construction projects which have saved Tribes money that would otherwise be consumed by inflation and additional mobilization expenses.

Indian Tribes celebrate these successes, and they want to see them repeated throughout the country. These examples can serve as "best practices" in transportation planning and government-to-government cooperation. Tribal governments are better positioned today to tackle problem areas in Tribal transportation than ever before, and they can save lives by intelligent planning, better design, implementing highway safety programs and conducting regular road maintenance and periodic road safety audits.

We just need adequate resources and sensible Federal transportation laws, regulations, and policies which aid, rather than hinder us, in getting the job done.

IV. Indian Reservation Roads Are Not Safe Roads

Despite this progress, we need Congress and the Administration to partner with Tribal governments to *dramatically* reduce highway injuries and fatalities that plague Indian communities at rates several times above the national average. My grandchildren live on the Standing Rock Sioux Reservation. I want them and all Native American children to have a safe and healthy future. We must do more to keep them safe when they walk to school, ride a bus, or jump into their parents' cars and trucks. We must educate them early to buckle up and not to drink and drive so that when it is their turn to get behind the wheel, they will be responsible drivers. Tribal communities must also change bad behaviors and set a good example for our youth.

Congress and the Administration must also do their parts. Tribes are struggling to find the funds necessary to meet the tremendous transportation needs in Indian Country. Congress and the Administration must recognize that Indian Tribes have the most

rudimentary transportation infrastructure in the country and lack the funds needed to maintain roadways in a safe condition. Tribal transportation programs have too few personnel to attend to required activities.[2] Indian Tribes should be treated as equal partners. The significant progress Tribes have made in the last two decades to assume direct responsibility for their transportation systems should be applauded and rewarded by giving Tribal governments the financial resources they need to build and maintain safe roads and save lives. Transportation planning, design, construction, and maintenance are not occasional occurrences, and Tribal governments must have the resources they need to carry out this core governmental function. No one else can do it better than the Tribes themselves.

Adequate funding levels are needed if we are to design safer roads with features such as guard rails, rumble strips, clearly visible signs, reflective markers, and wide, level shoulders. We must increase law enforcement patrols to enforce traffic laws and respond to accidents more quickly. We must provide adequate Emergency Medical Services and associated medical facilities so that prompt medial assistance is available to the injured within the critical "golden hour" after an accident. And we must adequately maintain routes in Indian country so that poor road maintenance does not continue to be a major contributing factor to traffic accidents in Indian country. Poor road maintenance is a silent killer that preys on the distracted mother, the sleep-deprived father, the inexperienced son or daughter, and the aunt or uncle who drive while impaired.

A. Grim Statistics

Our future goals, for safe, well maintained streets are clear, but the present reflects a grim reality. Native Americans suffer injury and death driving and walking along reservation roadways at rates far above the national average.

- Motor vehicle injuries are the leading cause of death for Native Americans ages 1-34, and the third leading cause overall for Native Americans;[3]

- The motor vehicle death rate for Native Americans is nearly twice as high as other races;[4] motor vehicle crashes were the leading cause of death among Native Americans age one to 19, and the Aberdeen, Billings, and Navajo Areas had motor vehicle-related death rates at least three times greater than the national rates;[5]

---

[2] "Transportation Planning on Tribal Lands," Melissa Savage, National Conference of State Legislatures, August 2006, p.1.

[3] "Safety Belt Use Estimate for Native American Tribal Reservations," National Highway Traffic Safety Administration, DOT HS 809 921, Final Report, October 2005, p. 1.

[4] *Id.*

[5] Center for Disease Control, Injury Center, Atlas of Injury Mortality Among American Indian and Alaska Native Children and Youth, 1989-1998, Executive Summary (www.cdc.gov/ncipc/pub-res/American_Indian_Injury_Atlas/05Summary.htm).

- Native Americans in South Dakota are three times more likely to be killed in a motor vehicle accidents than the rest the of State's non-Native population; from 2001 to 2005, over 25% of individuals who lost their lives in traffic accidents in South Dakota were Native American even though Native Americans comprise only 8.3% of the State's population; [6]

- The South Dakota Department of Transportation (SDDOT), working with ICF International, Inc., Interstate Engineering, Inc., and the State's Indian Tribes, in a recently published report, found that 737 accidents (or 64% of all motor vehicle accidents) on nine reservations in South Dakota in 2005 were not reported; [7]

- 123 North Dakotans were killed in traffic accidents in 2005, an increase of 23% over 2004; 4,360 North Dakotans were injured. Eighty-eight percent of the fatal accidents in North Dakota occurred in rural areas (nearly 9 out of every 10 fatalities);

- According to estimates by the National Safety Council, the economic cost in 2005 for each fatality in terms of lost wages, medical expenses, administrative expenses, motor vehicle and property damage, and employer costs, exceeded $1.14 million for each life lost and over $50,000 for every person injured. In 2005, for North Dakota alone, those figures translate to a cost of nearly $360 million for the State's 123 traffic fatalities ($140.2 million) and 4,360 traffic injuries ($218 million);[8]

- 5,962 fatal motor vehicle crashes were reported on reservation roads between 1975 and 2002 with 7,093 lives lost. The trend is on the increase, up nearly 25% to over 284 lives lost per year in the last five years of study;[9]

    - 76% of the fatalities were not seat belt or child safety seat restrained compared to 68% nationally;[10]

    - Since 1982, 65% of fatal crashes occurring on reservations were alcohol related compared to 47% nationwide;[11]

- According to information presented by the Michigan Tribal Technical Assistance Program (Michigan Technological University), nearly three-quarters (73%) of

---

[6] "Improving Motor Vehicle Crash Reporting on Nine South Dakota Indian Reservations," South Dakota Department of Transportation, June 2007.
[7] *Id.*
[8] "North Dakota Vehicle Crash Facts for 2005," North Dakota Department of Transportation, Crash Facts (www.nd.gov/dot/dlts.html).
[9] "Fatal Motor Vehicle Crashes on Indian Reservations 1975 - 2002," National Center for Statistical Analysis, National Highway Traffic Safety Administration, DOT HS 809 727, Technical Report, April 2004, p. 1.
[10] *Id.*
[11] *Id.*, p. 2.

Native American children under age 5 who died in traffic accidents were not in a child safety seat. *Less than 7%* were wearing a seat belt. More than half of these fatalities could have been prevented if these children had been restrained;[12]

- NHTSA data shows that approximately 3 out of every 4 fatalities on Indian reservations were not restrained at the time of the motor vehicle accident. In 2002, only 16% of motor vehicle fatalities on reservations were restrained;[13] and

- American Indians have the highest rates of pedestrian injury and death per capita of any racial or ethnic group in the United States.[14]

These statistics are shocking and bear witness to the consequences of maintaining the status quo concerning Federal Tribal transportation policies. I am troubled by the disparity between national traffic safety statistics and the statistics coming out of Indian country. According to the National Highway Traffic Safety Administration (NHTSA): "The Department has made transportation safety its highest priority. The Secretary has mandated an ambitious DOT-wide safety goal to reduce the traffic fatality rate to no more than 1 fatality per 100 million vehicle miles traveled (VMT) by the end of 2008."

We have over 11 million VMT in the IRR Program inventory, yet the average number of Native Americans killed in motor vehicle accidents annually throughout NHTSA's 28-year study was 213. While the number of fatal crashes in the nation during the same period declined 2.2%, the number of fatal motor vehicle crashes per year on Indian reservations increased 52.5%.[15]

If Tribal governments, the Departments of the Interior and Transportation, and State DOTs are to reverse the traffic fatality rates among Native Americans, Congress will need to direct more resources to the many factors that contribute to highway fatalities than are presently available. Many traffic accidents that occur on reservation roads can be prevented through application of the four "Es":

1. Education;
2. Enforcement;
3. Engineering; and
4. Emergency Medical Services

B. Invest in Prevention

---

[12] *See* "Race and Ethnicity in Fatal Motor Vehicle Traffic Crashes 1999 – 2004," National Center for Statistics & Analysis, DOT HS 809 956, Technical Report, May 2006, p. 14.

[13] "Safety Belt Use Estimate for Native American Tribal Reservations," NHTSA, DOT HS 809 921, October 2005, p. 1.

[14] "Pedestrian Safety in Native America," FHWA-SA-04-007 Technical Report, September 2004.

[15] "Fatal Motor Vehicle Crashes on Indian Reservations 1975-2002," p. 2.

If I leave you with one message today, Mr. Chairman, it is "prevention." As much as I wish it, Congress will not appropriate the billions of dollars needed to redress all the unmet transportation needs in Indian country in next year's appropriations acts. But I am asking Congress to identify and fund those preventative measures that Federal, State and Tribal governments can take to reverse the consequences of years of neglect of Tribal transportation infrastructure, as well as to help us curb the societal behaviors which contribute to making Indian reservation roads the most dangerous roads in America.

But it must be a combination of resources to reconstruct and repair unsafe roads, provide law enforcement, emergency medical services, and educate Native American communities to make highway safety a priority. Any one component alone, without the support of the other components, will not be as effective.

I speak from experience regarding the damage that traffic fatalities cause to Tribal families. My niece Nickie (Nicole) Red Tomahawk, my brother Wilbur's eldest daughter, was killed 16 years ago in an automobile accident on the Reservation. She lost control of the SUV she was driving. It rolled over. She was thrown from the vehicle and died at the scene.

Nickie was 19. She had a bright future ahead of her: college, a job, marriage, and children. She would be 35 years old today with her own family. The accident is still fresh in our families' mind. Every day our family prays to the Great Spirit for her.

People ask me why I am so insistent on safety. If I can prevent a single motor vehicle fatality and save another family from experiencing the tragic loss we experienced then we are all successful. I believe in the four Es and want to share highway safety measures and road safety awareness with every Tribe. From 1996 – 2005, however, 71 residents of the Standing Rock Sioux Reservation were killed in motor vehicle accidents. It was the number one killer on our Reservation.

I now turn to the specific recommendations to improve the delivery of transportation services in Indian country.

V. Recommendations to Improve Federal Transportation Policies in Indian Country

Tribes are assuming greater responsibility for transportation planning, design, construction and maintenance. TEA-21, SAFETEA-LU, and the IRR Program regulations have created additional opportunities for Indian Tribes to interact with State Departments of Transportation on mutually beneficial transportation projects, to negotiate road maintenance agreements with State governments that prolong the useful life of IRR-financed routes without the approval of the Interior Secretary, to conduct long range transportation planning, hire their own engineers to finalize PS&E packages, and consult with Metropolitan Planning Organizations and Regional Planning Organizations on long-term transportation planning goals. Mr. Chairman, we must encourage these partnerships so that consultation is the norm and all governments work to achieve mutually agreed-

upon transportation goals. This can be the future of the Indian Reservation Roads Program if Congress and the Administration will take the following actions:

1. Increase Funding for the IRR Program in the Next Highway Reauthorization Bill to Meet Tribal Transportation Needs of the 21st Century

The backlog of unmet transportation construction needs in Indian country is in the tens of billions of dollars. It hinders economic development, education, and the delivery of housing and health care to millions of Native Americans who reside on Indian reservations simply because it raises the cost of doing business on Indian reservations. Infrastructure should be a Tribal resource, but it is not. It is a hazard.

It is not exceptional for Indian Tribes to operate one- and two-person transportation departments. At Standing Rock, I and my assistant comprise the entire Transportation Department. While State Departments of Transportation, city and county governments and Metropolitan Planning Organizations (MPOs) are staffed with engineers and other professionals to plan transportation projects and work with stakeholders to prioritize transportation projects, Tribal governments do not have comparable resources to operate complimentary transportation programs.[16] Until the Federal agencies request and Congress appropriates more resources, Tribal governments will always be playing "catch up" with their State and local government counterparts. Indian country cannot be expected to rectify our physical transportation infrastructure needs if we do not also have the financial resources to properly staff and operate Tribal government departments to be capable of coordinating with our Federal, State and local government counterparts.

According to data compiled by the Associated General Contractors of America (AGC), since 2004 the construction industry has been hit by a series of significant price increases impacting a variety of basic construction materials. It was AGC's estimate that a "realistic inflation target for construction materials appears to be 6-8 percent, with periods of 10 percent increases quite possible."[17] These cost increases outpaced consumer and producer price indices significantly. According to the AGC report, for the 12 months ending August 2006, the cost of inputs for highway and street construction was up 13.8%, the producer price index (PPI) for "other heavy construction" was up 10.3%, and the index for non-residential buildings was up 8%.[18] The report noted that: "The highway construction index is driven to a greater degree than the building construction indexes by the cost of steel bars … and plates (for bridges), ready-mixed concrete, asphalt, and diesel fuel, *all of which have experienced double-digit cost increases in the past 12 months*."[19]

---

[16] National Conference of State Legislatures, p. 2.

[17] "AGC's Construction Inflation Alert," Reported by AGC Chief Economist Ken Simonson, September 2006, http://www.agcak.org/akancasn/doc.nsf/files/7DBB5CEFBE545B13872571FF0080B299/$file/AGCsConstructionInflationAlert.pdf

[18] *Id.*, p. 2

[19] *Id.*

Congress authorized $450 million for the IRR Program for FY 2009. If Tribes are to maintain the positive gains made in TEA-21 and SAFETEA-LU and keep up with construction inflation which is running into double digits in many BIA Regions, we respectfully request that Congress authorize funding increases to the IRR Program in the next highway reauthorization bill of *at least* $25 million annually, combined with the restoration to the IRR Program of the obligation limitation exemption which existed prior to TEA-21. These funding increases for Indian reservation roads are the absolute minimum needed to keep up with inflation, let alone meet the growing needs of Indian country.

Congress must sustain and continue its commitment to improving transportation infrastructure on Indian reservations if the gains of the last few years are to be maintained. This commitment will spur economic development on Indian reservations more than any other single Congressional action.

2. Increase funding for the BIA Road Maintenance Program within the Interior and Related Agencies Appropriations Act

Funding for the BIA Road Maintenance Program is a national disgrace. The Administration's use of the Program Assessment Rating Tool (PART) Performance Measurements to justify annual reductions to the BIA Road Maintenance Program is shortsighted and fails to protect these valuable taxpayer-funded infrastructure investments. The Office of Management and Budget's road budget makes no economic sense and squanders taxpayer money. Failing to adequately budget for the BIA Road Maintenance Program also violates Federal law.

When, in SAFETEA-LU, Congress authorized Tribes to spend up to 25% of their IRR Program dollars for maintenance, Congress expressly stated that:

> "***The Bureau of Indian Affairs shall continue to retain primary responsibility, including annual funding request responsibility, for road maintenance programs on Indian reservations.*** The Secretary [of Transportation] shall ensure that [IRR Program] funding made available under [section 204(c) of Title 23] for maintenance of Indian reservation roads for each fiscal year ***is supplementary to and not in lieu of any obligation of funds by the Bureau of Indian Affairs for road maintenance programs on Indian reservations.***"

23 U.S.C. §204(c), as amended.

The opposite of what Congress intended in SAFETEA-LU is occurring. As funding for the IRR Program goes up as authorized under SAFETEA-LU, the Administration submits budgets to Congress to reduce funding for the BIA Road Maintenance Program. Newly built or reconstructed roads must be maintained if they are to meet their design life and provide safe passage for people, goods and services.

Poorly maintained roads in the Dakotas have cracks from frost heave, rutted pavement from tire wear, prairie dog damage and faded and worn pavement markings. These compromised conditions contribute to traffic accidents by degrading the pavement surface and can contribute to a driver losing control in snow or rain and at high speeds.[20]

The BIA Road Maintenance Program is so poorly funded that there is no allowance for even emergency road maintenance needs to address life threatening circumstances that result from a "catastrophic failure or natural disaster." As stated in the IRR Program regulations, examples of emergency maintenance include "ice and snow control, traffic control, work in slide areas, repairs to drainage washouts, retrieving hazardous materials, suppressing wildfires, and repairing the ravages of other disasters." 25 C.F.R. § 170.812. Every BIA Region experiences emergency road and bridge maintenance needs yet lacks the resources to respond to them.

The following table illustrates the see-saw funding levels for the BIA Road Maintenance Program since 1980.

BIA Road Maintenance Funding as a Percentage of Appropriations for the DOI Construction/IRR Program Funding 1980-2008* (data obtained from BIA's History of Road Construction and Maintenance Funds 1951-2004)				
Year	BIA Rd Main. Appropriation (millions)	DOI Construction/IRR Program Appropriation (millions)	Combined Rd Main. and DOI Constr./IRR Appropriation (millions)	Rd Main. dollars as % of DOI Constr./IRR Program dollars
1980	$18.434	$66.5	$84.934	27.7%
1982	18.041	$47	65.041	38.3%
1986	22	100	122	22.0%
1990	30.598	81	111.598	37.7%
1992	41.0	159	200.0	25.7%
1994	29.772	191	220.772	15.5%
1998	25.373	225	250.373	11.2%
2000	26.437	293.3	319.737	9%
2002	35.6	275	310.6	12.9%
2006	28	330	358	8.4%
2007	29	370	399	7.8%
2008	26* (President's budget request)	420* (SAFETEA-LU authorized amount)	446* (projected)	6.1%

[20] "Road Safety Audit for Improvements to Standing Rock Sioux Tribe Reservation Roads," Hamilton Associates, October 2005, pp. 10-11.

In recent years, the BIA Road Maintenance Program budget, as a percentage of the IRR Program appropriation for the same year, has fallen below 10%. In 1990, Congress appropriated $30.598 million which represented 37.7% of the combined maintenance and construction budgets. But by 2000, road maintenance as a percentage of available maintenance and construction funding had fallen to 9% and funding dropped to $26.437 million.

At its high watermark fifteen years ago, in 1992, the BIA Road Maintenance Program received $41 million and accounted for 25.7% of the combined road maintenance and construction appropriation allocation for the IRR Program. According to data in the Roads Inventory Field Data System (RIFDS), between 1996 and 2006, the IRR Program inventory grew nearly 74%, from 49,132 miles to 85,454 miles. If the Administration's FY 2008 funding request for the BIA Road Maintenance Program is approved by Congress, Road Maintenance funding will fall to $26 million, or 6.1% of total maintenance and IRR Program construction funds, its lowest percentage level in over 56 years.

To spend six cents of every dollar on road maintenance when other public authorities spend many times that amount does not protect the investment which the Unites States and Indian Tribes have made in transportation infrastructure. This funding gap also exacerbates the backlog of unmet construction need by cutting the useful life of roads in half and will lead to more traffic injuries and fatalities. The lack of adequate road maintenance funding hinders every other form of financial assistance to Indian country, thus making it more difficult for the United States and Indian Tribal governments to achieve their stated Indian policy goals.

a) The PART Performance Measurement of the BIA Road Maintenance Program Misses the Mark

The Administration's PART Performance Measurement acknowledged that state and county governments provide more resources per mile than the BIA. It noted that the majority of the BIA road system (2/3 of the system) is unimproved and earth surface (dirt) and, "therefore, requires far more extensive methods to maintain for public use."[21] The PART evaluation of the BIA Road Maintenance Program concedes that:

> "The problem is 1) local public entities are refusing to use their HTF [Highway Trust Funds] funding to reconstruct their roads/bridges when they have met their design life, forcing Tribes to redirect their IRR HTF funding to reconstruct these roads/bridges; and 2) local public entities do not maintain their roads adequately requiring these roads/bridges to be reconstructed more frequently. This results in ineffective use of BIA road maintenance resources and Tribal HTF resources."[22]

---

[21] See OMB's Program Assessment Rating Tool Performance Measurement for the BIA Road Maintenance Program (2004) (www.whitehouse.gov/omb/expectmore/detail/10002352.2004.html).

[22] *Id.*

Is it any wonder that the BIA Road Maintenance Program is scored by OMB as not demonstrating results? But rather than recognizing that the poor performance of the BIA Road Maintenance Program is due in large part to insufficient funding, and requesting additional funding to address this problem, the Administration has used the poor PART Performance Measurement as a justification for seeking less funding for the BIA Road Maintenance Program. Recognizing that under Administration policies, funding is tied to the PART Assessment, the IRR Program Coordinating Committee, in January 2007, asked the BIA to have officials responsible for the PART Performance evaluation of the BIA Road Maintenance Program to brief the Committee on the evaluation, and identify ways to improve the Program's rating. The BIA has been unresponsive and this briefing still has not occurred.

It is the United States' statutory obligation under SAFETEA-LU and other Federal laws to maintain the IRR Program system of roads. Common sense dictates that if taxpayer dollars are used to finance a public road in Indian country, the United States should also ensure that funds are adequate to ensure that the full useful life of the public road is met. Are not the roads over which millions of Native Americans and others travel each day just as important to the Federal government's trust responsibility to Tribal resources as the land over which the roads lie?

The authority granted Indian Tribes in SAFETEA-LU to use up to 25% of their annual IRR Program funds for maintenance purposes does not excuse the Interior Department of its statutory and moral obligation to keep IRR Program roads safe and adequately maintained.

b) Indian Reservation Roads Cost More to Maintain But Receive Less

In January 2007, the Coordinating Committee provided BIA officials with statistics (Caterpiller Performance Handbook, 1999) that showed that the typical 5-year cycle maintenance costs for a gravel road – the predominant road type in Indian country – is $4,160 per year per road mile for grading, resurfacing, and re-graveling.

To demonstrate how bad the shortfall in maintenance funding is, if Congress appropriated the 1999 estimate of $4,160 for the 34,885.3 miles of just the BIA- and Tribally-owned routes now included in the BIA's RIFDS, made no adjustment for inflation, and excluded funding for routes owned by States, counties, townships, etc., and appropriated an additional $20 million to maintain the approximately 1,200 BIA- and Tribally-owned bridges included in the IRR Program inventory (which represent only 27.5% of the 4,301 IRR Bridges), the Road Maintenance Program budget would be $165.122 million for FY 2008 ($145.122 million + $20 million). The Administration's FY 2008 Road Maintenance request of $26 million is only 15.75% of the $165.122 million figure.

The road maintenance funding estimate I have proposed excludes any funding to maintain routes and bridges now included in RIFDS which are owned by public

authorities other than the BIA and Tribes. But, as noted by OMB, many of these roads are being and frankly must be maintained by Tribal governments in order to provide critical access to Tribal communities.[23] In fact, as of today, there are 86,759 miles in RIDFS (51,873 miles of non-BIA and Non Tribally owned routes) and 4,301 bridges, owned by both Federal, Tribal, State, county, township, and other State subdivisions.

If Tribes and the Federal government invest taxpayer dollars to build and reconstruct roads in Indian country, it makes sense to adequately maintain these routes to improve their useful life. If *pennies* are spent on road maintenance, *dollars* will need to be spent on road reconstruction, and many more dollars on the societal cost of traffic fatalities and injuries.

NCAI and many Tribal leaders, including Standing Rock Sioux Chairman Ron His Horse Is Thunder, have requested at least a $100 million funding level for the BIA Road Maintenance Program. The BIA has acknowledged that it requires at least $120 million to annually maintain BIA-owned roads and bridges, $50 million per year for bridge rehabilitation and replacement, and $100 million per year for upgrading and expanding transit services and systems.[24]

Given the stark statistics discussed above, we respectfully request that Congress appropriate at least $150 million for the BIA Road Maintenance Program to maintain IRR Program roads and bridges to a minimally adequate standard.

3. The BIA Must Comply with SAFETEA-LU's Mandate to Distribute Available IRR Program Funds For the Use of Indian Tribes Within 30 Days of Receipt of the Funds

One of the biggest problems I have witnessed in the operation of the IRR Program is the unnecessary delay by the BIA in distributing IRR Program allocations among the 12 BIA Regions and, from these Regional Offices, to the Tribal governments that have chosen to contract the IRR Program and BIA Road Maintenance Program under the ISDA. Congress was clear in SAFETEA-LU when it amended the law to require that:

> "Not later than 30 days after the date on which funds are made available to the Secretary of the Interior under [section 202 of Title 23] funds shall be distributed to, and available for immediate use by, the eligible Indian Tribes, in accordance with the formula for distribution of funds under the Indian reservation roads program."

23 U.S.C. 202(d)(2)(E)(i).

The reality is that the BIA does not distribute IRR Program funds within 30, 60, or even 90 days of receipt from the FHWA. On the one hand, the BIA claims that it cannot

---

[23] *Id.*

[24] "Transportation Serving Native American Lands," TEA-21 Reauthorization Resource Paper, BIA (May 2003), p. 32.

transfer the IRR Program funds until it has self-determination contracts or self-governance compacts in place, and on the other hand, it has dragged its feet in finalizing mutually acceptable model funding agreements. It cannot have it both ways.

Contrary to this statute, each August, BIA Regions return tens of millions of dollars of IRR Program funds to BIA Headquarters because these funds were received too late in the fiscal year, while Tribes are practically begging for construction funds. Short construction seasons mean that priority road projects do not get built and the cost for building roads in Indian country continues to outpace funding.

The failure by the BIA to develop acceptable ISDA model contracts and Annual Funding Agreement addenda further compounds the problem Tribes are experiencing in delivering transportation services to their communities. That is one reason why the Standing Rock Sioux Tribal Council opted to enter into direct negotiations with FHWA in 2005 to contract the IRR Program under an agreement with FHWA rather than continue to negotiate ISDA construction contracts with the BIA. Under our IRR Program Agreement with FHWA, our Tribe receives its IRR Program allocations timely, even this year when Congress passed four continuing resolutions before the final FY 2007 joint resolution was enacted in February.

It is bad enough when an agency practice runs directly against its stated policies and hinders the efforts by Indian Tribes and BIA Regions to improve transportation systems in Indian country. It is worse when a law is enacted by Congress to facilitate the transfer of funds from the BIA to Tribal governments and the law is ignored or made irrelevant by agency inaction. The 30-day rule is the law. It promotes the objectives of the IRR Program. The BIA should obey it.

4. Simplify the Federal Grant and Contract Application and Award Process for Tribal Governments

Why are Tribal communities lagging so far behind the nation in reducing fatal traffic accidents? It is as if national campaigns to reduce traffic accidents and deaths end at reservation boundaries. I am afraid that resources are not reaching reservation communities at the rate that they should. These shortfalls in funding have a devastating effect on Native Americans who are dying and suffering injuries at unacceptable rates.

If Indian Tribes are eligible recipients of Federal transportation funding, for the programs to work in Indian communities, the money must reach the intended beneficiaries. That is not the case presently.

Part of the problem lies in the cumbersome, and wholly separate processes by which Indian Tribes must apply for Federal transportation, transit, and traffic safety grants administered by multiple Federal agencies (BIA, FHWA, NHTSA, FTA, Federal Aviation Administration (FAA), etc.) or Federal transportation grants administered through the States (Safe Routes to Schools, High Risk Rural Roads, Highways for Life, etc.).

We strongly recommend that agencies within the Department of Transportation (Federal Lands Highway, FTA, NHTSA, and FAA) develop a simplified contract document for Tribes. This will encourage more Tribes to apply for these grants and bring the benefits of the Federal programs to Indian communities where they are most needed. Direct Federal funding of Tribes through Tribally-protective and appropriate government-to-government agreements streamlines Tribal access to Federal program funds by removing artificial barriers to these grant funds by eliminating the unnecessary, costly and time consuming process of requiring Tribes to contract with the States for receipt of Federal transportation dollars. The Safe Routes to School Program and High Risk Rural Roads Program are just two examples among many of the Federal programs that should be directly available to Indian Tribes.

As noted above and as discussed in the 2006 report by the National Conference of State Legislatures, most Tribal governments lack the personnel and resources to administer multiple Federal grants and contracts with widely varying terms and conditions. Complex, conflicting grant conditions and reporting requirements hinder efficient Tribal administration of transportation programs and projects. The agencies should develop a single grant application process with one annual deadline as Congress directed the Secretary of Transportation to do for the States in applying for Highway Safety Program grants under SAFETEA-LU. See 23 U.S.C. §402(m), as amended, sec. 2002(d) of SAFETEA-LU, 119 Stat. 1521-1522.

Developing a simplified agreement, which takes into account the unique legal status of Tribes and respects Tribal sovereignty, will improve program performance and Tribal accountability.

Under SAFETEA-LU, Congress directed the BIA to also "establish a similar simplified process for applications for grants from Indian Tribes under [Chapter 4 of Title 23]" as well. *Id.* To date, I am not aware of any action taken by the BIA's Indian Highway Safety Program (IHSP) to consult with Indian Tribes, the Nation's Tribal Technical Assistance Programs (TTAPs), or the IRR Program Coordinating Committee concerning the development of a simplified single grant application process for Highway Safety Program grants. Despite numerous invitations to the former Program Administrator of the BIA's IHSP to attend an IRR Program Coordinating Committee meeting, no representative of that office has ever attended a Coordinating Committee meeting. This has occurred even though a number of our meetings were held in Albuquerque, New Mexico where IHSP offices are located.

I trust that the next Program Administrator will actively consult and work with Indian Tribes, the TTAPs, and the Coordinating Committee to implement SAFETEA-LU's mandate.

5. Implement Model IDSA Contracts and Agreements so that Indian Tribes May More Easily Assume the Secretary of the Interior's Duties for the IRR Program

Congress recognized the need for a standardized model contract in the self-determination context in 1994 and legislated, in P.L. 103-413 (1994), the content of a non-construction Indian Self-Determination Act (ISDA) contract. See 25 U.S.C. §450*l*. This is known as the "model Section 108" ISDA contract. Similar model agreements should be developed to speed the distribution of Federal transportation dollars to Indian Tribes as direct recipients.

The IRR Program Coordinating Committee and other Tribal advocates provided a sample Title I Indian Self-Determination contract to BIA officials in the summer of 2006 for use in the IRR Program. To date, the BIA has not approved a sample ISDA contract for Indian Tribes. Only last month did the BIA's Office of Self-Governance issue a proposed Title IV Self-Governance Model Indian Reservation Roads Addendum for use by Self-Governance Tribes. Tribes are still waiting for the Interior Department's awarding officials and attorneys to provide a response to the Tribally-proposed model Title I ISDA contract for the IRR Program.

Interior Department attorneys have incorrectly concluded that Tribes must negotiate a separate agreement if they wish to use innovative financing techniques to pay for eligible IRR Program projects. This is shortsighted and legally unnecessary. It will hinder the use of innovative financing techniques by Tribes by raising the transactional costs associated with flexible financing arrangements.

Because of the Interior Department's intransigence on this issue, Tribes are being forced to use outdated, overly burdensome ISDA contracts that BIA Regional Office Awarding Officials are "used to" negotiating. These contracts do not reflect many of the hard won improvements to the IRR Program that Tribes negotiated with BIA and FHWA in the final IRR Program regulations, implemented in November 2004, and which Congress included in SAFETEA-LU. These improvements include Tribal approvals of Plans, Specifications & Estimate (PS&E) packages, full annual advance funding, and innovative financing techniques by which Tribal governments, if they choose, can leverage IRR Program funds to help finance road projects.

The delay in the award of IRR Program contracts hurts every Tribe's bottom line and reflects poorly on the BIA's administration of the IRR Program. Roads are not being built in a timely manner and present continuing safety risks. Construction seasons are limited in many BIA Regions. The ideal time to bid out construction jobs – to lower cost – is in the middle of winter, not in the spring or summer months when the BIA is now releasing the majority of IRR Program funds.

Delays in the ISDA contracting process, a process that has been in place for over 30 years, only make transportation construction more costly. Model IRR Program funding agreements will help bring the BIA into compliance with SAFETEA-LU's 30-day payment mandate and better serve Indian country.

It should be a goal of the Department of Transportation and Department of the Interior to lower the cost of doing business in Indian country. It will allow Tribes to put Federal funds into the roads and bridges that can improve the quality of life of our communities, not waste money serving a complicated bureaucracy. This goal cannot be met until the BIA approves and widely distributes to the BIA Regions acceptable model ISDA agreements.

6. The BIA and FHWA Must Complete a Comprehensive National Inventory of Transportation Facilities Eligible for Assistance Under the IRR Program

The inventory of the Indian Reservation Roads Program is growing at a dramatic rate. In 2005, there were 62,319 road miles in the BIA's RIFDS. In 2007, there are more than 85,000 road miles in RIFDS, an increase of more than 37%. BIA System roads, those dirt, gravel, and paved roads owned by the BIA, are only a subset of all eligible IRR Program routes. The entire IRR Program System of roads eligible for funding under the IRR Program is also comprised of routes owned by Tribes, States, counties, townships, and other Federal agencies.

The IRR Program formula, by which Federal funds are apportioned among the Nation's Federally recognized Indian Tribes, places heavy emphasis upon road inventory miles. See 25 C.F.R. §§ 170.201 et seq. The integrity of the IRR Program is dependent upon accurate and complete information on each Indian Tribe's IRR Program inventory of eligible roads.

a) SAFETEA-LU Mandates a Comprehensive Update

When Congress passed SAFETEA-LU in 2005, Congress directed the Secretary of Transportation, in cooperation with the Secretary of the Interior, to complete by August 10, 2007, a "comprehensive national inventory of transportation facilities that are eligible for assistance" under the IRR Program. 23 U.S.C. §202(d)(2)(G). The comprehensive inventory update was meant by Congress to be more than just a "snapshot" of the current IRR Program inventory. It was meant to identify and fill in the gaps between the existing incomplete IRR Program inventory and what the inventory would include if all eligible IRR routes were included.

Unfortunately, it is my understanding as Chairman of the IRR Program Coordinating Committee that a snapshot is all that Indian country and the Congress will get, unless Congress demands that the agencies conduct a comprehensive inventory update of the IRR Program as it so plainly directed in SAFETEA-LU.

The inventory assessment is intended to assist the agencies to identify Tribal transportation facilities and determine the relative transportation needs among Indian Tribes. Eligible routes, at a minimum, by law include:

i) routes included in the BIA system inventory receiving funding since 1992;

ii) routes constructed or reconstructed with funds from the Highway Trust Fund under the IRR Program since 1983;
iii) routes owned by an Indian Tribe;
iv) community streets or bridges within the exterior boundaries of Indian reservations, Alaska Native villages, and other recognized Indian communities (including communities in former Indian reservations in Oklahoma) in which the majority of residents are American Indians or Alaska Natives;
v) "primary access routes" proposed by Tribal governments, including roads between villages, roads to landfills, roads to drinking water sources, roads to natural resources identified for economic development, and roads that provide access to intermodal termini, such as airports, harbors, or boat landings.

In addition, Congress directed in SAFETEA-LU that nothing shall preclude the Secretary of Transportation from including additional transportation facilities that are eligible for funding under the IRR Program "if such additional facilities are included in the inventory *in a uniform and consistent manner nationally*." This has not occurred.

b) The BIA and FHWA Must Exercise Leadership

Regrettably, the IRR Program Coordinating Committee has not reached consensus, and the BIA and FHWA have not adopted, uniform guidelines on what routes are and are not eligible for inclusion in the IRR Program inventory for purposes of determining funding under the IRR Program formula (Tribal Transportation Allocation Methodology). How can the IRR Program Coordinating Committee, BIA, FHWA, or Congress accurately assess the fairness of the current formula for the IRR Program if the BIA and FHWA have not set clear guidelines on the types of routes that may be added to Tribal inventories or the process which Indian Tribes and BIA Regions must follow to place such routes into the RIFDS?

The impasse over establishing a "bright line" policy as to the types of routes eligible for inclusion in the IRR Program inventory, and the minimum data that Indian Tribes must include with every route submitted to the BIA for inclusion in their IRR Program inventory, has caused considerable delays, uncertainty, and frustration in the distribution of IRR Program funds. Challenges and appeals over the BIA's failure to include routes in the IRR Program inventory delay the BIA's full distribution of IRR Program funds, again contrary to Congress' 30-day payment mandate.

When the IRR Program Coordinating Committee cannot reach consensus on fair, reasonable and equitable rules for the inclusion of routes in the IRR Program inventory, it must fall to the BIA and FHWA to exercise leadership. The Coordinating Committee is an advisory committee to these agencies. I hope that the agencies will always accept the Committee's recommendations. Ultimately, however, it is for the BIA and FHWA to interpret and implement the law. But they must do so in a timely manner. The IRR Program must benefit all Indian Tribes, regardless of size. Every Indian Tribe has

transportation needs. Large Indian Tribes have large road inventories and require the funds to maintain them, and replace them when they are worn. Smaller Tribes require funds to plan, design, build, and maintain their priority routes.

So long as the comprehensive update of the IRR Program, and the identification of eligible routes that are not yet included in the inventory, is incomplete, these additional routes are invisible to the IRR Program, to policy makers and appropriators. Inventory is a key component to funding and these agencies have a special obligation to Indian Tribes to identify all eligible routes and help Indian Tribes update their Tribal inventories.

c) Agencies' Report to Congress

SAFETEA-LU requires the agencies to submit a report to Congress on the national Tribal transportation inventory not later than November 10, 2007, 90 days after the inventory is completed in August of this year. Mr. Chairman, we want what Congress mandated in SAFETEA-LU: a "comprehensive national inventory of transportation facilities that are eligible for assistance" under the IRR Program. By November 2007, more than two years after SAFETEA-LU was enacted, if all the BIA and FHWA report to Congress is that the IRR Program inventory is incomplete, and does not include all routes that are eligible under SAFETEA-LU for inclusion in the IRR Program inventory, the agencies will not be telling Congress or Indian Tribes anything new.

We ask that this Committee direct the BIA and FWHA to provide Congress and the Nation's Indian Tribes with a comprehensive review and report on the total IRR Program inventory of transportation facilities eligible for inclusion and funding under the IRR Program as directed in SAFETEA-LU.

7. Congress Should Encourage the President to Nominate a Candidate to Fill the Position of Deputy Assistant Secretary for Tribal Government Affairs within the Department of Transportation

Tribes worked very hard during the consideration of SAFETEA-LU to develop consensus positions to advocate before the Administration and Congress. This Committee knows how difficult it is to legislate in the field of Indian law and obtain a unified position from 564 sovereign Tribal governments. Our strategy was quite successful as is reflected in the many positive provisions contained in SAFETEA-LU. However, this success will not be realized if the Administration does not act on the legislative mandates.

For this reason, we are disappointed that the Administration has so far failed to nominate anyone to fill the position of Deputy Assistant Secretary for Tribal Government Affairs, as required by SAFETEA-LU. Tribes advocated, during Congress' consideration of SAFETEA-LU, for the creation of this position at the Assistant Secretarial level so that Tribal transportation issues would be more prominent before the Department and within the Office of the Secretary.

As it states in SAFETEA-LU: "in accordance with Federal policies promoting Indian self determination, ***the Department of Transportation shall have, within the office of the Secretary a Deputy Assistant Secretary for Tribal Government Affairs appointed by the President to plan, coordinate, and implement the Department of Transportation policy and programs serving Indian Tribes and Tribal organizations and to coordinate Tribal transportation programs and activities in all offices and administrations of the Department*** ... ." 49 U.S.C. § 102(f)(1), as amended.

If a Deputy Assistant Secretary at DOT had been in place, perhaps the Department would have developed, in consultation with Indian Tribes, Tribal eligibility for the Scenic Byways program as authorized under SAFETEA-LU, and concluded that Indian Tribes are eligible sub-recipients for the State-administered Safe Routes to School Program, without requiring the intervention of Indian Tribes and the Congress, to overturn the Department's initial position.

We commend FHWA Administrator Rick Capka, former Associate Administrator Arthur Hamilton, and Office of Transit Programs Director Mary Martha Churchman, and their staffs, for their support of and advocacy for the IRR Program, Tribal Transit Grants, and Tribal transportation generally. The IRR Program is a small component of the Federal Highway Administration's Federal Lands Highways budget and jurisdiction. There is no substitute for an Assistant Secretary with primary responsibility for ensuring that all agencies within DOT coordinate their actions in a manner that best serves Indian country and the overall goals of the Department.

We ask the Committee to urge the Administration to fill the Deputy Assistant Secretary position at DOT at the earliest possible date. This appointment will help achieve the goals of Congress, the Administration, and Indian Tribes to improve the delivery of Tribal transportation programs at all levels within the Department of Transportation.

8. Increase the Number of DOT Programs Which Indian Tribes May Participate in as Direct Recipients

Indian Tribes have demonstrated that they possess the capacity to deliver successful transportation programs despite the many obstacles that stand in our way. We are separate sovereign governments and not subdivisions of the States. While Indian Tribes may be eligible sub-recipients of some State-administered programs financed by the U.S. Department of Transportation, such as the Safe Routes to Schools, High Risk Rural Roads Program, and Highways for Life, Indian Tribes do not typically receive their fair share of these program funds.

I hope my testimony today, and the statistics that I have referenced, drive home to you how great the transportation needs are in Indian country. A little assistance will go a long way because our statistics of traffic safety accidents and fatalities are so high. Congress should therefore increase the number of Department of Transportation programs that Indian Tribes may apply for directly rather than as sub-recipients through the States. In many instances, the forms of State contracts are too cumbersome, or are simply

objectionable to Tribes, requiring Tribes to waive their sovereign immunity from suit, or appear in State courts. The result is that Tribes often do not even apply for these much needed grants.

9. Establish a Federal Lands Highways Safety Program for Indian Reservation Roads; Set Aside for the High Risk Rural Road Program; and Increase Funding for FTA's Tribal Transit Grant Program to $50 Million Annually

Under SAFETEA-LU, for FY 2008, Congress authorized $1.275 billion for the highway safety improvement program under section 148 of title 23 (High Risk Rural Road Program); and authorized nearly $700 million under Title II of SAFETEA-LU for the Highway Safety Programs of chapter 4 of title 23. These funds include: for highway safety programs ($225 million); highway safety research and development ($107 million); occupant protection incentive grants ($25 million); safety belt performance grants ($124.5 million); State traffic safety information system improvements ($34.5 million); alcohol-impaired driving countermeasures incentive ($131 million); national driver register ($4 million); high visibility enforcement program ($29 million); motorcyclist safety ($6 million); and child safety and child booster seat safety incentive grants ($6 million).

SAFETEA-LU amended section 402(c) of title 23 to increase the set aside of appropriations for Highway Safety Programs to the Secretary of the Interior from ¾ of one percent to two percent annually, but this increase still provides less than $5 million dollars to be divided among all 564 Federally recognized Tribes.

We must build on this success and establish an Indian Reservation Roads Safety Program for the Federal Lands Highways office within the Department of Transportation. In 2004 and 2005, Indian Tribes sought to establish a set aside for the IRR Program for the High Risk Rural Road Program during the Congress' consideration of SAFETEA-LU as well as a Federal Lands Highways safety program funded at $40 million annually. We currently recommend that Congress create a 2% set aside for the IRR Program for the High Risk Rural Roads Program, and create a Highway Safety Program for Indian reservation roads within the Federal Lands Highways with an appropriation amount of $50 million annually to dramatically reduce the incidence of death and injury on America's Indian reservation roads.

If Congress develops Tribal set asides for Department of Transportation safety programs, it would do so much to combat behavioral and safety issues that contribute to the high rates of death and injury on Indian reservation roads.

The Tribal Transit Program is a huge success and demonstrates the unmet need for more transit funding of Tribal transit programs. Our Reservation operates a transit program and it benefits so many of our members, including students attending Sitting Bull College. As noted above, nearly 100 Tribes submitted applications to FTA in the first year FTA announced the program. FTA was able to fund over 60 of the applicants. Due

to the demonstrated high demand and proven results, Congress should increase the authorization for the Tribal Transit Grant Program to $50 million annually.

10. Increase Funding to the Successful Tribal Transportation Assistance Programs (TTAPs) to at least $2.5 Million Annually to Increase Awareness in Indian Country of "Best Practices" in Transportation Planning, Design, Construction, Maintenance, and Highway Safety Measures.

Tribal Technical Assistance Programs (TTAPs) are the real unsung heroes in Tribal transportation policy. They work to educate Tribal officials on transportation issues, increase the technical capacity of Tribal governments in the transportation arena, and provide training in safety and equipment operation and maintenance. As a result of their efforts, Tribal governments are playing a greater, and more informed, role in the delivery of transportation services to their communities.

The TTAPs are 15 years old, having been created in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and is funded in part through FHWA's Office of Professional and Corporate Development (OPCD), and with IRR Program funds. Seven TTAPs assist Tribes throughout the country. Under SAFTEA-LU, the BIA is authorized to fund the TTAPs at $1.0 million annually. I recommend that Congress increase funding to the TTAPs to $2.5 million annually so that they may expand their valuable services to Indian Tribes.

11. Promote the Use of Flexible Financing Arrangements in Standard ISDA Contracts and Agreements.

I have personally witnessed the benefits to be gained through the use of flexible financing techniques. Flexible financing or advance construction agreements allow Tribes to use a portion of their IRR Program funds to repay government bonds or commercial lenders the interest and principal for loans advanced to the Tribe to finance an IRR Program-eligible project. To be eligible, the project must be included on an FHWA-approved Transportation Improvement Program (TIP). Innovative financing is different than pay-as-you-go (paygo) arrangements in that an entire construction project may be bid out as a single project which creates economies of scale, reduces mobilization costs, and minimizes the negative effects that construction inflation would otherwise have on available funds that are saved by the Tribe over time.

The Standing Rock Sioux Tribe financed a $26.5 million reconstruction of community streets throughout our reservation in 2003-2006 using an advance construction agreement we negotiated with the BIA and FHWA. This project was a resounding success. We are especially disappointed therefore that the Assistant Secretary-Indian Affairs informed the IRR Program Coordinating Committee in April 2007 that the BIA will not recognize advance construction authority through straight-forward Indian Self-Determination Act (ISDA) contracts and Self-Governance agreements. Instead, the BIA will only enter into an advance construction arrangement with a Tribe through negotiation of a separate

agreement, under authority of 23 U.S.C. § 204, which is not included in or referenced by the ISDA contract or agreement.

The Assistant Secretary's letter does not explain the BIA's rationale as to why the ISDA contract, the contract document which Tribal governments are most familiar with and accustomed to negotiating with the BIA for over 30 years, is not an acceptable agreement for the use of flexible financing arrangements by Tribes. I enclose the Assistant Secretary's April 27, 2007, letter and the Coordinating Committee's original letter of February 14, 2007.

The BIA's decision will likely result in fewer Tribes using advance construction agreements in the future to finance eligible road construction projects. This decision will also make it harder for Tribes to obtain short term bridge loans to complete projects at the end of a fiscal year. This will mean unnecessary project closures and costly demobilizations and remobilizations. To mandate that Indian Tribes must negotiate a separate advance construction agreement is not sensible and raises the cost of doing business in Indian country. As the Assistant Secretary concedes in his letter, the "Federal Government does not act as a surety, guarantor, or project financier or request approval of a loan from any lending institution" under these agreements, so there is no reason to require the Tribes to enter into a separate entirely superfluous agreement, when the Self-Determination agreement can serve this same purpose.

By contrast, FHWA, in negotiating its IRR Program Agreement with five Indian Tribes in 2006, allowed the IRR Program Agreement to reference the IRR Program regulations' flexible financing provisions (25 C.F.R. 170.300 et seq.), and permit the Tribes, at their option, to direct a portion of their IRR Program funds to be paid from FHWA directly to the bond trustee or lending institution financing an eligible project under the IRR Program. This more sensible approach lowers transaction costs and provides incentives to lenders to do business with Tribal governments on transportation projects.

We encourage the Committee to either counsel the Department of the Interior to retract its unwarranted decision or clarify in future legislation that advance construction agreements may be included in the standard Title I ISDA contract and Title IV Self-Governance agreement.

12. Implement Right-of-Way Reform in Indian Country to Facilitate Reconstruction of Existing Roads and the Design and Construction of New Roads.

Reservation areas are often a checkerboard of fee, allotted, and Tribal trust lands. Therefore, it is often time-consuming and expensive for Tribes and the Federal government to obtain all of the necessary and appropriate rights-of-way before beginning construction or renovation of roadways, bridges, and other transportation infrastructure.

The BIA is responsible for maintaining records of rights-of-way in Indian Country. Unfortunately, BIA right-of-way records management is in a terrible state. IRR projects

are often delayed by months – or even years – because the BIA realty officers cannot locate valid right-of-way records. Tribes are using their IRR Program funds, the only funds the BIA claims are available, to cure inaccurate or lost rights-of-way. Tribal and Federal funds are thus often wasted in re-acquiring valid rights-of-way simply because adequate BIA records have not been kept.

The Interior Department should undertake a major new initiative to organize, update, and computerize its BIA right-of-way records. It should make these records available to Tribal governments in an easy-to-access format such as a GIS/GPS mapping system. The Interior Department should also be more aware and protective of Tribal jurisdictional interests in the right-of-way acquisition and transfer process, in light of the U.S. Supreme Court's adverse right-of-way ruling in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and subsequent cases.

The Federal government should also work closely with Tribes to implement a proactive program of "corridor management." Through "corridor management," Tribally-preferred corridors for transportation and other infrastructural elements – such as for electrical lines, water lines, and others – can be planned well in advance. In some instances, the easements for these corridors may be obtained in advance. Corridor management requires Tribal governments to think proactively about how they envision future development to occur on their reservations. Through corridor management, rights-of-way for all inter-related infrastructural development projects can be obtained in a unified manner, speeding up design and construction once a specific project is authorized and funded.

The Federal government should be an active and supportive partner in providing technical assistance to Tribes who wish to apply the principles of corridor management to their transportation programs and to general reservation development.

VI. Conclusion

Indian Tribes are coming into their own in the transportation field. Tribal governments are focusing on long-range transportation planning, assuming the Interior Department's duties for the IRR Program, partnering with States and county governments on mutually beneficial construction projects, and looking at innovative ways to finance the development of infrastructure on their reservations. These trends should be applauded and I wish to thank the Members of this Committee for the many beneficial legislative changes that you worked to include in SAFETEA-LU. Yet even with these successes, many challenges still remain. Congress and the Administration must recognize that if Indian Tribes are to overcome these challenges, Tribal governments must be given the resources to succeed.

I hope that as a result of this hearing Tribal governments, Tribal Technical Assistance Programs (TTAPs), and State DOTs, can work in greater concert with the BIA and Department of Transportation to improve transportation infrastructure in Indian country –

from building and enhancing Tribal transportation departments to building and maintaining safer roads in Indian country.

Tribal communities will not suffer the traffic fatalities and injuries at the rates we are now seeing if we can interact on a more equal footing with States, to plan, design, build and maintain our inventory of roads, and implement traffic safety measures which States have shown to be successful in promoting highway safety. Pockets of best practices exist within the agencies which demonstrate that the manner by which Indian Tribes receive Federal funds and operate Federal transportation can be improved for the better. Tribes need the help of Congress to makes these best practices the rule, rather than the exception.

Tribal governments, Federal agencies, and Congress need to open a new dialogue where old habits and old ways of doing business are discarded for more efficient practices. We are making progress in Tribal transportation and I encourage this Committee and the Congress to work in partnership with Indian Tribal governments. Indian Tribes are ready to do our share to improve the safety of our communities for ourselves and our children's future.

Thank you for giving me the opportunity to present testimony regarding Tribal transportation issues on behalf of the Standing Rock Sioux Tribe.

INDIAN RESERVATION ROADS COORDINATING COMMITTEE
Albuquerque, NM Meeting
February 14, 2007

Via Facsimile
(202)208-1873

The Honorable James Cason
Associate Deputy Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Associate Deputy Secretary Cason:

Thank you for meeting with the Tribal members of the IRR Program Coordinating Committee on January 25, 2007. We value the productive discussions we had with you, Mr. Ragsdale, Mr. Gidner, and your staff concerning the state of the IRR Program and our recommendations to improve it.

We write to follow up on the issue of flexible financing. It is an important issue for two reasons. First, flexible financing/advance construction techniques are tools which Indian tribes have used successfully to raise private capital to finance much needed road construction projects that they could not otherwise afford to construct using the traditional pay-as-you-go finance method. Second, flexible financing is an allowable activity under Title 23 United States Code (23 U.S.C. §204(b)) and the IRR Program regulations (25 C.F.R. Part 170.300 et seq.).

Since our meeting of January 25th, we learned that an Attorney Advisor in the Minneapolis Field Solicitor's Office issued a memorandum to the Great Plains Region Branch of Roads Engineer on December 21, 2006, in which the Regional engineer was informed that the Solicitor's Office in Washington, D.C. has advised the BIA that no further flexible financing agreements are to be entered into between the BIA and Indian tribes, whether under authority of the Indian Self-Determination Act, P.L. 93-638 or under authority of 23 U.S.C. § 204. The Attorney Advisor advised the Great Plains Region Branch of Roads Engineer that until further notice, tribes interested in flexible financing provisions should seek agreements with the Federal Highway Administration (FHWA).

The BIA entered into an Advance Construction Agreement with the Standing Rock Sioux Tribe in 2004 for a $26.5 million reconstruction of

community streets. This agreement was approved by Interior Department's Office of the Solicitor. The project was an overwhelming success. In 2006, FHWA signed five agreements with Indian tribes under authority of SAFETEA-LU and "in accordance with the Indian Self-Determination Act." All of these agreements authorize the use of advance construction financing at the discretion of the tribe.

The Attorney Advisor's memorandum, which we enclose with this letter, offers no explanation why existing authorities, under 23 U.S.C. § 204 or 25 C.F.R. § 170.300 et seq., are not adequate to support the incorporation of advance construction provisions in an appropriate agreement.

Flexible financing techniques: 1) are authorized by federal law and regulations, 2) have been approved by the Department in prior agreements, 3) have a proven track record of success, 4) provide jobs, spur economic development and make reservation roads safer, 5) bring private financing to Indian country, and 6) advance Tribal and federal goals to address the horrendous state of reservation infrastructure in Indian country.

We do not want the Solicitor's Office to issue an opinion that would deprive Indian tribes of a financing tool available to every State and which is authorized by law. We do, however, ask that you ascertain the Department's objections to this financing technique and provide the Committee with a reasoned and understandable explanation of why the Solicitor's Office has put a stop to this authorized activity.

We look forward to your earliest possible response to this matter.

Sincerely,

Pete Red Tomahawk 2-14-07 — 2/14/07

Pete Red Tomahawk, Chair — Royce Gchachu, Vice-Chair

Enclosure

cc: Mr. Patrick Ragsdale
Mr. Jerry Gidner
Mr. LeRoy Gishi
Office of the Solicitor
Mr. Robert Sparrow
Vivian Philbin, Esq.

United States Department of the Interior

OFFICE OF THE FIELD SOLICITOR
U.S. Department of the Interior
Bishop Henry Whipple Fed. Bldg.
1 Federal Drive, Room 686
Twin Cities, MN 55111-4030

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

12/21/2006

TO: Gerry Foell
BIA/GPRO/Roads
Facsimile: 605-226-7430
Phone: 605-226-7645

Date: December 21, 2006

cc: Regional Director Bill Benjamin (via fax at 605-226-7446)

FROM: Sharon Pudwill
Attorney-Advisor

TOTAL PAGES: 1
(including cover page)

RE: Flexible Financing Agreement for Advance Road Construction
Cease Entering into these Agreements!

This fax confirms our conversation this morning, advising you that the Bureau of Indian Affairs should not enter into any more of the flexible financing agreements for advance construction like the agreements entered into with the Standing Rock Sioux Tribe and the Lower Brule Sioux Tribe. As you know, the Inspector General is looking into the validity of these agreements.

The Solicitor's Office in Washington D.C. has advised that no further agreements be entered into until further notice. In the interim, tribes may pursue flexible financing and advance construction through the Federal Highway Administration.

Please feel free to call me at 612-713-7100 if you have any questions.

REC'D MAY 7 2007

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

APR 27 2007

Mr. Matthew S. Jaffe
Sonoksy, Chambers, Sachse, Endreson & Perry
1425 K. Street, NW, Suite 600
Washington, D.C. 20005

Dear Mr. Jaffe:

Thank you for faxing me a copy of the letter of February 16, 2007, to Associate Deputy Secretary James Cason, from Chairman Pete Red Tomahawk and Vice Chairman Royce Gchachu, Indian Reservation Roads Program Coordinating Committee ("the committee") regarding their concern with flexible financing agreements.

We share the committee's view that flexible financing affords tribes advantages in meeting their transportation infrastructure needs. Our participation to date has been in developing advance construction agreements and project agreements designed to help foster this capacity building for tribes. An advance construction agreement is specifically designed to allow a tribe to utilize a portion of its IRR program funds to repay commercial financing instruments by acknowledging the project, and agreeing to transfer the negotiated amount into the tribe's special bank account and include the project in the tribe's IRR transportation improvement program (TIP). The Federal Government does not act as a surety, guarantor, or project financier or request approval of a loan from any lending institution. As of this date, tribes have only utilized flexible or innovative financing to advance approved projects. The use of this flexible financing methodology has been strictly between the tribe and the lender and has not involved the BIA.

The lending institutions may have a sense of comfort in knowing that advance construction agreements are in place, but the agreements offer nothing more than an acknowledgement of available IRR program funding that may be used by the tribe to pay either principal or interest for any lending agreements for the projects.

The authority granted under 23 U.S.C. §204 is that the Secretary may enter into construction contracts and other appropriate contracts (other than P.L. 93-638 contracts and agreements) with an Indian tribe. This section authorizes the Secretary to enter into the advance construction agreements based on the criteria stated above.

We will continue to support tribes in advancing projects and improving Indian Reservation Roads, regardless of the road owner. After review by both the BIA and the Solicitor's Office, we have determined to continue to allow advance construction agreements and project agreements, where applicable, based on the following criteria:

1. That all advance construction agreements will be reviewed and approved by the Office of the Solicitor before execution.
2. That all project agreements, when BIA roads are specifically identified to be advance constructed, will be reviewed and approved by the Office of the Solicitor before execution.
3. That all (advance construction and project) agreements will be entered into as separate agreements based on 23 U.S.C. §204(b)(2)(B) and not included in or referenced in P.L. 93-638 contracts or agreements.

Thank you for your interest and support of the Indian Reservation Roads program. If you have additional questions, please contact LeRoy Gishi, Division of Transportation at (202) 513-7711 or Sabrina McCarthy, Office of Solicitor at (202) 219-2139.

Sincerely,

Carl J. Artman
Assistant Secretary – Indian Affairs